85-759

No.

Supreme Court, U.S.
FILED
NOV 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MARYLAND,

Petitioner,

v.

HAROLD GARRISON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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102 pp

QUESTION PRESENTED FOR REVIEW

Does the Fourth Amendment exclusionary rule require suppression of heroin seized from Respondent's separately leased third floor apartment during execution of a valid warrant for Lawrence McWebb's third floor apartment when the police reasonably believed that there was only one third floor apartment, both when applying for the warrant and during its execution?

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF MARYLAND,

Petitioner

v.

HAROLD GARRISON,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

OPINION OF THE COURT BELOW

The reported opinion of the Court of Special Appeals of Maryland in Garrison v. State, 58 Md. App. 417, 473 A.2d 514 (1984), affirming Respondent's conviction is reproduced in the Appendix (pp.1-27).

The reported opinion of the Court of Appeals of Maryland, Garrison v. State, 303 Md. 385, 494 A.2d. 193 (1985), reversing Respondent's conviction is reproduced in the Appendix (pp.28-44).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing Appellant's conviction was filed June 27, 1985. Petitioner, the State of Maryland, filed a Motion for Reconsideration on July 12, 1985, which was denied by the Court of Appeals of Maryland on September 3, 1985. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) and Rules of this Court, Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On May 21, 1982, members of the Baltimore City Police Department executed a search and seizure warrant for the third floor apartment at 2036 Park Avenue in the City of Baltimore, Maryland. Lawrence McWebb was named in the warrant as the occupant of the premises. The warrant described 2036 Park Avenue as a three story brick dwelling.

A pre-trial hearing was held on March 2, 1983, pursuant to motions filed by both McWebb and Respondent, Harold Garrison, to suppress the evidence seized. The warrant, the application, the return and a diagram of the third floor at 2036 Park Avenue were admitted in evidence as State's exhibits.

The affidavit accompanying the application for a search and seizure warrant recited that Lawrence McWebb was known as "Red Cross"; that a reliable informant, instrumental in successful prosecutions in eight search and seizure cases, had purchased marijuana from "Red Cross" at his third floor

apartment within the previous twenty-four hours; that the affiant, Detective Albert Marcus, had checked with the Baltimore Gas & Electric Company and determined the premises at 2036 Park Avenue, 3rd Floor, were in the name of Lawrence McWebb; and that records of the Baltimore City Police Department confirmed that McWebb resided at that address. The description of Lawrence McWebb in police arrest records matched the description provided by the confidential reliable informant who positively identified a picture of McWebb as "Red Cross" from whom he/she had purchased marijuana within the previous twenty-four hours. Further, Det. Marcus averred:

> "No controlled and supervised purchase of Marihuana was requested of the Informant or attempted due to the fact that the apartment is located on the third floor of the premises and it would be impossible to keep the informant under constant observation during the purchase, thus making the purchase tainted. Additionally, no observations of the apartment were conducted due to the fact that it would be impossible to

> tell which apartment the individuals would enter."

The warrant authorized the search of McWebb and of the premises "known as 2036 Park Avenue, third floor apartment." The property authorized to be seized included "marihuana, related paraphernalia, monies, books, papers and photographs pertaining to the illegal distribution of marihuana."

As part of the return portion of the warrant, the executing police officer submitted the following statement:

> "At the time of execution of the attached search & seizure warrant, Lawrence McWebb was stopped outside of the premises and walked up to the third floor. As the key was placed into the lock of the third floor, the door was opened by Harold Garrison, Jr., who was dressed in night clothes. Upon entering the premises it gave the appearance of being one apartment with all doors being open giving free access all the way through the entire third floor. Closer inspection revealed that the third floor was equiped [sic] to accomodate two seperate [sic] apartments with a living room, bedroom, kitchen and bathroom in the front part and the same in the rear

> part. Located in the rear bedroom of Lawrence McWebb was [sic] papers in the name of Harold Garrison. While at the premises, the telephone rang in the front bedroom (Harold Garrison). When answered the subject on the phone asked for 'Red Cross' who was Lawrence McWebb and had a seperate [sic] telephone in his rear bedroom.
>
> Based on the appearance upon entering, and evidence recovered in the bedroom of Lawrence McWebb, it is believed that although the third floor is divided into two seperate [sic] apartments, both McWebb & Garrison had free access to the entire third floor and share a common interest in both apartments."

Det. Marcus testified at the suppression hearing that prior to making his application for the warrant, he looked at the building at 2036 Park Avenue in order to verify information received from the confidential informant, and observed that it was a three story, multi-family dwelling. However, he did not know how many apartments were inside the building.

He checked with the Baltimore Gas and Electric Company and was told that the third floor apartment was listed to Lawrence McWebb. Marcus asked if

there were a front or rear or middle room and "they told me, one third floor was only listed to Lawrence McWebb". Marcus testified that he had no idea that Respondent also lived on the third floor.

Detective Russell Shea testified that on May 21, 1982, he, Marcus, Sergeant Joseph Schanken, and three other Baltimore City police officers executed the search warrant. When they approached the building Shea could tell that it contained apartments but could not tell from the outside how many apartments there were. The front door was locked and there were seven individual mailboxes. Shea put on a construction hat as a ruse and attempted to gain entry to the common door without forcibly knocking it down. Each mailbox had a bell at the bottom, a mail slot above it and a place for a name above the slot. There were no apartment numbers or letters visible on any of the mailboxes; nor was McWebb's name listed. Shea rang all of the bells and knocked on the door, but no one answered.

However, a forced entry was not necessary because Lawrence McWebb drove up to the house in his car, was detained and advised by police of the arrest and search warrants. McWebb unlocked the front door with his key and the six officers entered the first floor hallway. Without stopping, the entire group went up the stairs to the third floor. The detectives did not stop on the other floors to examine their character. It had occurred to Shea that there might have been more than one apartment on each floor, but he could not determine that simply from the number of floors because there was also a basement, which could have contained more than one apartment. When they got to the third floor, there was only one door, so it didn't occur to Shea that there might have been two apartments on the third floor. The locked door at the top of the stairs was opened by McWebb, permitting the police to enter a foyer with rooms to the left and to the right. As they went through the door, the officers immediately noted an open door to the left (later

identified as the living room occupied by Lawrence McWebb) and an open door to the right (later identified as the bedroom occupied by Respondent). Respondent, dressed in nightclothes, was standing to the right side of the foyer.

From five feet away in the hallway, Det. Shea saw loose marijuana on a newspaper located on a dresser inside the doorway to the bedroom (Respondent's) on the right side of the hallway. The officers split up to conduct the search. Shea went to his left and began searching what was later established to be McWebb's bedroom. He recovered a revolver, marijuana, and two electric bills, one addressed to McWebb and the other to Respondent. He testified that he did not notice at that time that one of the utility bills was marked "3F" and the other "3R."

Shea then proceeded across the open foyer through an open doorway to a bedroom on the right side of the third floor entrance. He observed clothing hanging on the door which was opened back to the

interior wall, and found, in the pockets of a jacket, syringes, a cap used for cooking heroin and five bundles of currency totalling $4000. During his search of the right bedroom (Respondent's), Shea answered the phone when it rang. The caller asked for "Red Cross", McWebb's street name.

Shea then noticed that the door had a dead-bolt lock. Sgt. Schanken observed that the door to the left of the hallway had a similar lock. Schanken then ordered the search stopped, and called Assistant State's Attorney John Prevas on Respondent's phone, because it appeared at that point that two apartments were involved. Shea testified that all of the interior doors on the third floor were open when the police entered. The door to the bedroom on the right was not only open, but had clothes hanging over it. Shea did not see any numbers or letters on that door or its frame.

Det. Marcus testified that upon entering the third floor, he observed a quantity of marijuana on a

dresser in a bedroom to his right and immediately proceeded into that area to seize the contraband. He, like Shea, placed Respondent in the foyer. Marcus recovered heroin from several dressers in Respondent's bedroom before he was advised by Sgt. Schanken to discontinue the search. Marcus also testified that the interior doors were all open and that there were clothes hanging on the door to the bedroom on the right. He did not see any numbers identifying separate apartments. Marcus explained that inside the apartment there was a common door which separated the two bathrooms, but it was open so that there was free access throughout the entire third floor. In preparing the inventory for the return, Marcus did not separate the property which had been seized on a room by room basis.

Sgt. Schanken, the officer in charge during the search, testified as a defense witness. He knew there were different apartments in the building because the warrant had been issued for the third floor

apartment. However, he did not know how many apartments there were and he had been unable to find out prior to entering the building. Schanken was the first police officer through the common door on the third floor and he saw Respondent standing right in front of him in the hallway. Respondent never said anything to him, nor informed him that he had a separate apartment. Respondent's door on the right was pushed wide open and clothes were hanging from it. At no time during the search did McWebb or Respondent indicate that there were two separate apartments. It was not until later, as he was walking around, that Schanken began to realize that there were two bathrooms, two kitchens and that there might possibly be two separate apartments. At that point, he ordered the officers to stop their search immediately.

Respondent testified at the hearing that on May 21, 1982, he was living at 2036 Park Avenue, apartment 3F, meaning 3 front. He had lived there by

himself since February 1979. Lawrence McWebb lived in the rear apartment on that floor - apartment 3R. Respondent testified that he obtained his mail from the mailbox which had his name and the number 3F on it. He acknowledged that the diagram of the third floor was basically accurate. He further identified Defense Exhibit 1A as a Baltimore Gas and Electric Company bill in his name. He could give no reason why his bill had been found in McWebb's apartment.

On the day of the search, Respondent was lying on his bed when he heard a commotion in the hall. Contrary to the police officers' testimony, he did not stand in the hallway, but remained in his apartment doorway with a police officer present. He testified that no phone calls were received in his apartment while the police were there and that his apartment had not been buzzed at all that day. Contrary to the testimony of the three police officers, Respondent testified that the apartments are designated "3F" and

"3R" by lettering on the doorjambs, [1] and claimed that the fire door between the two bathrooms had never been opened.

Lawrence McWebb also testified at the hearing. When he drove up, and was accosted by the police officers, he told them he was Lawrence McWebb and that he lived on the third floor, in the rear. McWebb denied having Respondent's electric bill or any other property of Respondent's in his bedroom. He insisted that the fire door between the two bathrooms was kept locked. He further testified that his mailbox had his name on it.

On cross-examination, McWebb admitted his nickname was "Red Cross". He also admitted that he

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[1] At the suppression hearing, Respondent offered photographs of the entrances to both apartments into evidence which tend to support his contention. However, the numerals were painted in the same brown color as the molding around the doorways. It is, of course, possible that the numerals were affixed between the time of the execution of the search warrant on May 21, 1982 and the suppression hearing held almost a year later.

had several prior convictions. He denied that the door to Respondent's bedroom on the right was open or that any of Respondent's clothes were draped over the door at the time of the entry.

McWebb sought suppression of the items seized from his apartment on the ground that the search warrant had not particularly described the premises to be searched. Respondent sought suppression of the items seized from his apartment because the officers did not have a warrant for his apartment, and had no right to go into his apartment because they either knew or should have known that his was a separate apartment.

In his ruling, Judge Basil Thomas, presiding in the Circuit Court for Baltimore City, made the following findings of fact and denied the motion:

> "Yes. Now the Defendant McWebb contends again that it was a general warrant. Now, Defendant argued that argument. That is the police knew or should have known that the Garrison apartment was separate and distinct from the apartment of the Defendant McWebb. He further

characterizes the testimony of police as perjured or unworthy of belief.

Now the Court, based on what it finds to be critical evidence, makes the following findings of facts: One, that on May 21st, 1982, the police executed a search and seizure warrant for premises at 2036 Park Avenue, third floor apartment. Two, the police had reliable information to believe the Defendant McWebb resided in a third floor apartment, did not know of another apartment on the third floor. Now, while it was evidence that there were a number of apartments in the building, police were unaware where these apartments were located or the character of the building.

Three, the Defendant McWebb was detained outside of 2036 Park Avenue. With the keys furnished by him, the police gained entrance through a locked front door to the building, next to the door were seven mail boxes with bells, or indicating were bells under each mailbox, but no names were reflected on any of the mail boxes. Further, McWebb's name was not visible on any of the mail boxes or any area adjacent thereto.

Next, the police were directed to the third floor by McWebb without any notice or knowledge of the layout of that area. Five, that entrance to the third floor was gained through a

common marked door which gave no indication that there was more than one apartment located on said floor. There was no one to alert anyone to indicate that there were more than one apartment.

Next, that upon opening said door, police found the Defendant Garrison standing there in his night clothes. Next, seven, upon entrance to the third floor, police saw an open door to the left, later identified as McWebb's apartment, and also an open door to the right later identified as Garrison's apartment. In fact, no door was visible at the time the police entered and the police were unaware at that time that there were two apartments.

Eight, that from that position of the hallway area leading to the two apartments, the police saw and based on their expertise located on top of the dresser in an open room to the right, a quantity of marijuana. Entrance was made into that room later identified as the apartment of Defendant Garrison where a police or the police found over the front door or the door leading to that area articles of men's clothing.

No numbers were observed by police upon entering the apartment which would alert them to a separate apartment. The room was searched, and in the apartment of Defendant Garrison was recovered a quantity of

heroin and approximately four thousand dollars in cash.

Nine, also significant or significantly at the time, neither Defendant Garrison nor Defendant McWebb indicated that there were two separate apartments on the third floor. Ten, that a copy of the search and seizure warrant was given to the Defendant McWebb. The inventory listed all the evidence seized from both apartments without indicating which pieces of evidence were found in each location. Eleven, it is clear that there was a common door which could be opened at the time of the search affording access between the two apartments.

The evidence indicates that while each apartment or the occupant of each apartment could have privacy by locking this door, nevertheless, there was free access judging from all the evidence at the time the police arrived there betwen the two apartments, and that the Defendants so intended based on the evidence that has been submitted before me.

* * *

Now, with respect to the search and seizure warrant. The general rule regarding the searches of multiple units for the purpose of satisfying the Fourth Amendment, searching two or more apartments in the same building, is no different

> than searching two or more completely separate houses. Probable cause must be shown for searching each house, or as the case may be, each apartment. However, there is an exception to this general rule where the multiple unit character of the premises is not externally apparent and is not known to the officer applying for or executing the warrant.
>
> It is clear that the warrant specified the premises to be searched as the third floor apartment of the Defendant McWebb, that the officers did not know that there was more than one apartment on the third floor and nothing alerted them of such a fact until the search had been made and the items were searched [sic]. In view of these findings, the Court will deny the motion of each Defendant to suppress the evidence."

Respondent proceeded to trial on a statement of facts with a plea of not guilty. [2] On March 18, 1983, he was found guilty of possession of heroin with intent to distribute and sentenced to a fifteen year term of imprisonment.

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[2] McWebb pled guilty to possession of marijuana with intent to distribute and did not appeal.

Respondent appealed to the Court of Special Appeals of Maryland, which affirmed the judgment of the trial court. His Petition for a Writ of Certiorari was granted by the Court of Appeals of Maryland. That court reversed Respondent's conviction, explaining that since there was no warrant authorizing police to search Respondent's apartment and since no exceptions to the warrant requirement applied to the facts in the instant case, the police had "no justification for entering his premises, regardless of appearances" (Apx. 40). On July 12, 1985, Petitioner filed a Motion for Reconsideration and Stay of the Mandate which was denied on September 3, 1985 (Apx. 47).

REASONS FOR GRANTING THE WRIT

The Court of Appeals of Maryland has decided an important question of federal law involving the Fourth Amendment and the application of the exclusionary rule that has not yet been, but should be,

settled by this Court. [3] Furthermore, it has decided this federal question in a way that is directly in conflict with applicable decisions of this Court.

Reasonable police conduct, and not perfection, is required by the Fourth Amendment. This Court and others interpret the Constitution to require the police to act with probable cause in searching protected areas and seizing items therefrom. Nevertheless, the Maryland Court of Appeals has held the police to the impossible standard of acting with actual knowledge of the truth with absolute certainty. In requiring a totally perfect performance of law enforcement duties, that court has, with the 20/20 vision of

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[3] Although the Maryland court referred to Article 26 of the Maryland Declaration of Rights, which parallels the Fourth Amendment, the court observed that the federal and state provisions were in pari materia (Apx. 36). Thus, the court's opinion was based on an interpretation of the Fourth Amendment and not on an independent state ground. Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214 (1983).

hindsight, placed an intolerable and impossible burden on law enforcement officers.

The State of Maryland is not seeking ratification of police conduct simply because the officers had a good faith belief that they were acting properly. Instead, the State maintains that there was no Fourth Amendment violation, no error of judgment by the police, no error in the warrant and, thus, no need to apply the exclusionary rule. The evidence seized from Respondent's apartment was admissible because the police had a reasonable belief under all the circumstances, both during their investigation leading to the application for the warrant and during their execution of the warrant, that they had identified and were in the apartment for which they had probable cause and as authorized by the search warrant.

In Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971), this Court upheld the arrest of a man whom the police reasonably, but

mistakenly, believed was the man they sought under a valid arrest warrant. Review by this Court is necessary to determine whether Hill applies by analogy to a search situation; whether the police can search the "wrong" apartment, if they reasonably believe it is the "right" apartment to be searched under a valid warrant.

In contrast, this case does not present an issue on the good faith exception to the exclusionary rule and is readily distinguishable from Massachusetts v. Sheppard, 468 U.S. __, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). Here there was no mistake on the face of the warrant in the description of the premises to be searched. Instead, the search warrant was valid on its face. The execution of the warrant was also reasonable, despite the mistaken belief that Respondent's apartment was part of the area described in the warrant as the premises to be searched.

ARGUMENT

A VALID WARRANT TO SEARCH THE THIRD FLOOR APARTMENT OF A BUILDING LATER DISCOVERED TO HAVE TWO THIRD FLOOR APARTMENTS PERMITS A SEARCH OF BOTH APARTMENTS CONDUCTED PRIOR TO THE DISCOVERY THAT THERE WERE SEPARATE APARTMENTS.

One of the specific commands of the Fourth Amendment is that all warrants shall "particularly describ[e] the place to be searched." A search warrant sufficiently describes the place to be searched if "the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended." Steele v. United States, 267 U.S. 498, 503, 45 S.Ct. 414, 416, 69 L.Ed. 757 (1925). Obviously, the primary purpose of this limitation is to minimize the risk that police officers executing search warrants will, by mistake, search a place other than the place intended by the magistrate. [4] A corrollary purpose is to assure

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[4] See People v. Edwards, 35 Ill. App.3d. 807, 342 N.E.2d 800 (Ill. App. 1976).

the presence of probable cause. The lack of a more specific description of the place to be searched may alert the magistrate to question whether the described items are to be found in a particular place. After the fact scrutiny of the particularity requirement requires focus on two separate aspects of the warrant process: the application stage and the execution stage. A Fourth Amendment violation occurs only when a defect is found in the reasonableness of police conduct at one of those two stages.

There are, and will be, instances where the description of the premises to be searched in the warrant is imprecise or faulty. Reviewing courts have generally upheld police actions where, despite the inaccuracy, the police have ultimately arrived at the right place. Even though the police initially may have been confused because of a mistake in the description on the warrant or mistakenly searched another apartment before getting to the one listed in the warrant, suppression has been rare.

Cases involving apartment buildings, where there is multiple occupancy, have provided continually perplexing problems to the police and the courts. It has long been held that police officers, before they constitutionally may search a separate residential unit within an apartment building, must have probable cause specifically related to that unit. United States v. Hinton, 219 F.2d 324, 325-26 (7th Cir. 1955). A single warrant "cannot describe an entire building when cause is shown for searching only one apartment." Moore v. United States, 461 F.2d 1236, 1238 (D.C. Cir. 1972). A general rule has evolved: a search warrant for an apartment building or other multiple occupancy building will be held invalid if it fails to describe the particular subunit to be searched with sufficient definitiveness to preclude a search of one or more subunits indiscriminately. [5] The Fourth Amendment

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[5] See United States v. Higgins, 428 F.2d 232 (7th Cir. 1970) (warrant invalid where apartment building had several separate addresses and otherwise was subdivided into apartments in (Cont'd.)

basis for this rule is that:

> ". . . Apartment dwellers not only have 'a reasonable "expectation of privacy,"' Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), quoting Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring), within the entire apartment building that runs against persons who do not live in (or have permission to enter) the building; they also have such an expectation within their individual apartments that runs against persons who do not live in (or have permission to enter) their individual apartments, including persons who nonetheless have authority to be in the building as a whole. Consequently, before police officers may frustrate this latter expectation by entering an apartment, they must demonstrate - in most cases before the fact and to a magistrate - that their proposed action is reasonable in light of the existence of probable cause to believe that a crime has been committed and that evidence relevant thereto is located in that apartment. See Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d

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ways that were externally evident to the police. Compare, Moore v. United States, supra, (warrant that failed to specify one of two apartments on second floor of specified building held valid because the annexed affidavit twice referred to Apt. No. 7).

> 723 (1964); Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961)." United States v. Dorsey, 591 F.2d 922, 928 (D.C. Cir. 1979).

However, the apartment search cases have not ignored the "realities of administration of criminal justice." Moore v. United States, supra, 461 F.2d at 1238. Instead, they require only as much specificity as police officers, with "practical accuracy" may provide. United States v. Santore, 290 F.2d 51, affirmed in relevant part en banc, 290 F.2d 74 (2nd Cir. 1960), cert. denied, 365 U.S. 834, 81 S.Ct. 745, 5 L.Ed.2d 743 (1961). Thus, the "reasonable expectations of privacy" protected by the warrant requirement, in the context of subdivisions of single buildings, "extend as far as, but no further than, the police actually knew or reasonably should have assumed they extended." United States v. Dorsey, supra, 591 F.2d at 929. This view, of course, is consistent with Scott v. United States, 436 U.S. 128, 137, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978), where this Court most recently

emphasized that the focus in Fourth Amendment cases is an objective one of the reasonableness of police activity in light of facts known to officers at the moment of the seizure or search.

In United States v. Santore, supra, an important exception to the subunit probable cause rule was recognized: If a building in question from its outward appearance would be taken to be a single-occupancy structure and neither the affiant nor other investigating officers nor the executing officers knew or had reason to know of the structure's actual multiple-occupancy character until execution of the warrant was under way, then the warrant is not defective for failure to specify a subunit within the main building. [6] There, the building appeared to be a one family house and had been so registered with the

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[6] See, Annotation: Search Warrant: Sufficiency of Description of Apartment or Room to be Searched in Multiple-Occupancy Structure, 11 A.L.R.3d 1330 and cases cited therein.

local authorities, but, unknown to the police or other authorities, and in contravention of local ordinances, the occupant had subdivided it. The Court of Appeals for the Second Circuit concluded:

> "In view of these facts, we think that the issued warrant described the premises to be searched with the 'practical accuracy' we have held to be necessary. . . . The description in the warrant was in accordance with the outward appearance of the structure, . . . and in view of the concealment by Orlando of the interior alterations by him, it would be absurd to say that the Government was on notice as to it. The agents were not warned of a possible dual occupancy of the house until after they had shown a copy of the warrant to Orlando and had entered inside. At that moment it was too late for them, consistent with the success of their mission, to have retreated and obtain a new warrant." Id, 290 F.2d at 67.

The soundness of this decision was emphasized by Professor Wayne LaFave, Search and Seizure, (1978) §4.5 at 80, wherein he explained:

> "At first blush, it might appear the Santore rule is unsound. Why, it might be asked, should the innocent occupants of other, separate living

units be subjected to the risk of search merely because of the prior police ignorance as to the multiple-occupancy character of the premises? So the argument might proceed, if, as noted earlier, a facially-sufficient description made in good faith will not be sustained when the police find, upon arrival in the general area described, that there are errors in description making it impossible to determine which building was intended, then surely the same result is called for when they cannot determine which part of a multiple-occupancy dwelling was intended. Three points may be tendered in response. First of all, in the latter situation the police can in no way be faulted for their failure to have a more specific description, for reasonable investigation would not have uncovered the multiple-occupancy character of the structure. Secondly, as emphasized in the last sentence quoted in Santore, the latter situation is unique in that the defect in the warrant description is discovered only after the police have tipped their hand by commencing execution of the warrant. Finally, there is ordinarily no risk to those in separate living units, for upon discovery of the multiple-occupancy character of the premises the police should be expected to draw upon all readily available information (whether or not in the warrant or affidavit) in deciding what part of the described

> premises may reasonably be searched. It is fair to conclude, therefore, that the Santore rule is sound, provided it is narrowly construed so as to apply only when: (i) the multiple-occupancy character of the building was not known and could not have been discovered by reasonable investigation; (ii) the discovery of the multiple occupancy occurred only after the police had proceeded so far that withdrawal would jeopardize the search; and (iii) upon discovery of the multiple occupancy, reasonable efforts were made to determine which subunit is most likely connected with the criminality under investigation and to confine the search accordingly."

The principle in Santore has been followed in Maryland[7] and in many other state and federal jurisdictions[8] to uphold admission of evidence taken from

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[7] Thomas v. State, 50 Md. App. 286, 437 A.2d 678 (1981); Green v. State, 38 Md. App. 63, 379 A.2d 428 (1977); Butler v. State, 19 Md. App. 601, 313 A.2d 554 (1974); Delly v. State, 30 Md. App. 391, 352 A.2d 331 (1976)

[8] United States v. Davis, 557 F.2d 1239 (8th Cir. 1977), cert. denied, 434 U.S. 971, 98 S.Ct. 523, 54 L.Ed.2d 461(1977); Houser v. Geary, 465 F.2d 193 (9th Cir. 1972), cert. denied, 409 U.S. 1113, 93 S.Ct. 927, 34 L.Ed.2d 696 (1973); United States v. Jordan, 349 U.S. 107 (6th Cir. (Cont'd.)

the premises intended to be included in the, in fact, overbroad warrant. The State submits that this rationale applies equally to permit use of evidence discovered during a reasonable search of all premises, even those not originally intended to be covered. Consequently, resolution of the propriety of the seizure of the items taken from Respondent's bedroom requires a two-fold inquiry: whether the police knew or should have known that separate apartments existed on the third floor of 2036 Park Avenue, (1) at the time of their application for the search and seizure warrant, and (2) at the time of the execution of the warrant.

1965); Owens v. Scafati, 273 F.Supp. 428 (D.Mass. 1967), cert. denied, 391 U.S. 969, 88 S.Ct. 2043, 20 L.Ed.2d 883 (1968); Jackson v. State, 129 Ga. App. 901, 201 S.E.2d 816 (1973); People v. Cain, 35 Ill. 2d 184, 220 N.E.2d 195 (1966); State v. Maulding, 29 Or. App. 1, 564 P.2d 729 (1977); State v. Chisholm, 7 Wash. App. 279, 499 P.2d 81 (1972); State v. Jenkins, 275 S.C. 129, 267 S.E.2d 542 (1980).

Reasonable Application for Search Warrant.

Respondent's co-defendant, Lawrence McWebb, argued that the Santore rule should not apply to the search because there had not been a reasonable application for the search warrant. No court, however, has yet explicitly agreed with him.

The police adequately described the premises to be searched and they unquestionably had sufficient probable cause for the search of McWebb's apartment, as recited in the facts, supra, at 3-18. The multi-occupancy character of the third floor was not known at the time of application and could not have been discovered by reasonable investigation. Other decisions have reached similar results under similar facts: see, e.g. United States v. Ramos, 282 F.Supp. 354, 355 (S.D.N.Y. 1968); People v. McGill, 187 Colo. 65, 528 P.2d 386 (1974); People v. Thomas, 70 Ill. App. 3d 459, 26 Ill. Dec. 940, 388 N.E.2d 941 (1979); People v. Franks, 54 Mich. App. 729, 221 N.W.2d 441 (1974); Delly v. State, 30 Md. App. 391, 352 A.2d 331 (1976).

Thus, prong one of the test - the reasonableness of the warrant application - was met.

Reasonable Execution of Search Warrant.

Respondent argued that, once it was shown at the suppression hearing that he had a separate lease, had paid a separate utility bill, and had a separately marked apartment on the third floor, the search of his bedroom was in violation of the Fourth Amendment because it was outside the scope of the warrant for McWebb's apartment. This information, however, was not available to the police prior to discovery and seizure of the heroin and should not have been used by the Court of Appeals of Maryland in finding the search and seizure unreasonable on the ground that the police knew or should have known that Respondent had a separate apartment on the third floor during the execution of the warrant.

The Court of Appeals unfortunately misconstrued the evidence and the trial judge's findings of fact. After citing the trial judge's findings of fact and

underlining the portion of his ruling where he said that it was "clear that the warrant specified the premises to be searched as the third floor apartment of the Defendant McWebb", the Court of Appeals concluded that "despite its denial of the defense motions, the trial court determined that the warrant, on its face, was limited to McWebb's apartment." (Apx. 35). The Court of Appeals has missed the obvious. The trial court was ruling on the suppression motions of both McWebb and Garrison, and the italicized portion clearly referred to McWebb's argument that the warrant was not sufficient to describe the premises to be searched as it affected his apartment. The Court of Appeals ignores the fact that the trial court went on to say with regard to Respondent's suppression motion:

> ". . . that the officers did not know that there was more than one apartment on the third floor and nothing alerted them of such a fact until after the search had been made and the items were searched [sic]." (Apx. 35).

Clearly, the trial judge found that the police neither knew nor should have known at the time of the execution of the warrant that there was more than one apartment on the third floor. In other words, Judge Thomas found that the police reasonably believed they were in McWebb's apartment when they searched the bedroom, which later turned out to be, in fact, the bedroom of Respondent and discovered heroin therein. The trial judge believed that nothing alerted the police of the actual existence of two apartments until after the search had been made and the drugs were seized. The record supports the trial court's finding that the police search of what turned out to be two separate apartments was proper under the authority of the warrant to search McWebb's third floor apartment.

The issue before the Court of Appeals should not have been limited to whether Respondent actually maintained a separate residence on the third floor, a fact conceded by the State. Rather, the issue was

whether the police officers' conduct was reasonable in the totality of the circumstances as they were at the time of the execution of the warrant. This Court has emphasized that one of the purposes of the search warrant requirement is to prevent hindsight from coloring judicial evaluation of the reasonableness of a search or seizure. See United States v. Martinez-Fuerte, 428 U.S. 543, 565, 96 S.Ct. 3074, 3086, 49 L.Ed.2d 116 (1976). Moreover, that judicial evaluation of the reasonableness must be based in light of the facts known to the police. Scott v. United States, supra. The Court of Appeals erred, therefore, in holding that the police had improperly "expanded" the scope of the search warrant for McWebb's apartment by searching Respondent's apartment.

Petitioner maintains that the search of Respondent's apartment, which was based on factual assumptions by the police, which were later found to be erroneous, may nevertheless be valid if there is an adequate factual basis in the record to determine the

reasonableness of the officer's conduct in making the search. In Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971), this Court held that the arrest of a person who was mistakenly thought to be the person named in an arrest warrant was nevertheless valid so long as the arresting officer: (a) had probable cause to arrest the person sought, and (b) reasonably believed the person arrested was the person sought. This Court emphasized:

> "The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." 401 U.S. at 803-804, 91 S.Ct. at 1110-1111, 28 L.Ed.2d at 489-490.

Accord United States v. McEachern, 675 F.2d 618, 621 (4th Cir. 1982); United States v. Glover, 725 F.2d 120,

122 (D.C. Cir. 1984); United States v. O'Connor, 658 F.2d 688, 691 (9th Cir. 1981).

Other courts have upheld police searches of the "wrong" apartment. See, e.g., State v. Hymer, 400 So.2d 637 (La. 1981) (search of defendant's locked room proper under warrant for entire house even where probable cause based on actions of someone other than defendant); People v. Kinnebrew, 75 Mich. App. 81, 254 N.W.2d 662, 664-667 (Mich. App. 1977) (search of defendant's first floor apartment under warrant for entire house reasonable where police not aware of multiple occupancy prior to search even though probable cause went to second floor apartment); State v. Hendricks, 145 N.J. Super. 27, 366 A.2d 999, 1000-1002 (1976) (search of entire first floor pursuant to warrant valid when subdivisions not apparent prior to search); State v. Woodard, 35 N.C. App. 605, 242 S.E.2d 201 (1978) (seizures from defendant's room upheld under warrant for entire

premises where owner, although present, failed to tell officers of separate rented bedroom).

As illustrated by the foregoing cases, the Fourth Amendment only protects persons against unreasonable searches, not imperfect ones. Under the reasoning of Hill, supra, this search of the "wrong" apartment was proper. The police officers had sufficient information from the informant, the utility company, and their own observations to believe that they were in McWebb's apartment, searching it pursuant to the warrant. Indeed, McWebb had led the officers to his apartment and opened the door with his key. That they mistakenly believed that they were in McWebb's bedroom was understandable and their search of the bedroom, later determined to be Respondent's, and seizure of heroin from it, was a reasonable response to the situation facing them at that time.

The trial judge held that everything the police knew led them to believe that they were in McWebb's

apartment at the time they were seizing narcotics. He found as fact that nothing alerted them that there were two separate apartments until after the heroin had been seized from Respondent's bedroom. He emphasized that the third floor was being commonly used by both McWebb and Respondent.

On the day of the execution of the warrant, the officers ascertained that there were seven mail boxes. However, that did not mean that there were seven apartments in the building. Because there were four separate floors in the building, including a basement, they had no way of knowing how the building had been subdivided. When McWebb suddenly appeared, the circumstances became exigent, and they had no choice but to accompany him directly to the third floor. When they entered the third floor from the stairway, with the help of McWebb and using his key, everything indicated that there was only one apartment on the floor. They saw a living room on the left and a bedroom on the right. They were looking for

marijuana and immediately saw it on top of a dresser in the bedroom to the right. Respondent was present in his nightclothes, leading to the conclusion that he was either McWebb's houseguest or roommate. An electric bill belonging to Respondent was found in McWebb's bedroom and McWebb reeeived a phone call, asking for him by his street name, on the phone in Respondent's bedroom. Neither McWebb nor Respondent told police they had separate apartments. The police officers said they did not see the numerals painted on the door frames. [9] It was only as the police were concluding their search and saw that there were two kitchens and an unlocked common door between two bathrooms that they realized that there could in fact possibly be two separate residences. At that point, the officer in charge stopped the search and

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[9] The police needed to fan out quickly in both directions on the third floor to make certain that no other persons were present who could pose a danger to them or who could be disposing of the drugs they were looking for.

immediately called an Assistant State's Attorney for advice. The search was not resumed. Clearly, therefore, the record supports the trial court's finding that the warrant was sufficiently particular to justify the search of the entire third floor and that the execution of the warrant was reasonably conducted.

The law enforcement community needs this Court to consider this case. Police officers routinely execute search and seizure warrants in multiple occupancy buildings and will undoubtedly make mistakes. They need a standard to determine which conduct is mistaken but reasonable, and which is unreasonable and a violation of the Fourth Amendment. The exclusionary rule should be restricted to cases of Fourth Amendment violations where it can have a deterent impact on police practices. To allow the Maryland Court of Appeals' decision to stand, condemning reasonable police actions under a valid warrant without explaining why they were unconstitutional, would be to condone an

intolerable miscarriage of justice that needs to be rectified.

CONCLUSION

Review by this Court is necessary to correct the erroneous interpretation of the Fourth Amendment and the application of the exclusionary rule by the Maryland Court of Appeals. Contrary to this Court's previous holdings, the Maryland court focused only on Respondent's subjective expectation of privacy, instead of viewing whether the action of the police officers was reasonable under the circumstances as they appeared at the time of the search. Moreover, the Maryland court held that, regardless of appearances, probable cause for police actions will not be enough; instead, the police officers must be held to a standard of actual knowledge and absolute certainty. This Court has held in Hill v. California, supra, that a police officer can arrest the wrong person under a valid arrest warrant if the officer reasonably believed the person he arrested was the one

who was sought in the warrant. Petitioner maintains that that analogy can be carried to the search situation. If the police have a reasonable, but mistaken, belief that they are searching an area authorized under the warrant, as they did here, that search must also be upheld.

For the foregoing reasons, Petitioner requests this Court to issue a Writ of Certiorari to the Court of Appeals of Maryland.

Respectfully submitted,

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APPENDIX

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

NO. 818

September Term, 1983

HAROLD GARRISON

v.

STATE OF MARYLAND

Wilner,
Bloom,
Getty,

JJ.

Opinion by Getty, J.

Filed: April 10, 1984

Harold Garrison proceeded to trial on a statement of facts following the denial of a motion to suppress evidence. On March 18, 1983, in the Circuit Court for Baltimore City (Thomas, J.), Garrison was found guilty of possession with intent to distribute heroin and was sentenced to a fifteen year term of confinement. On appeal, appellant raises two issues:

1. Whether the warrantless search of 2036 Park Avenue, Apartment 3F, and the seizure of items therein was legal where the police knew or should have known that appellant's apartment was separate and apart from apartment 3R, for which a search and seizure warrant had been issued?

2. Whether the plain view doctrine legitimized the search of appellant's apartment?

On May 21, 1982, members of the Baltimore City Police Department executed a search warrant for the third floor apartment located at 2036 Park Avenue in Baltimore City. Lawrence McWebb was named in the warrant as the occupant of the premises. The warrant described 2036 Park Avenue as a three story brick dwelling.

The affidavit accompanying the application for a search and seizure warrant recited that McWebb was known as "Red Cross;" that a reliable informant, instrumental in successful prosecutions in eight search and seizure cases, had purchased marijuana from "Red Cross" at his third floor apartment within the previous twenty-four hours; that the affiant, Officer Marcus, checked with the Baltimore Gas & Electric Company and determined the premises at 2036 Park Avenue, third floor, were in the name of Lawrence McWebb; and that records of the Baltimore City Police Department confirmed that McWebb resided at that address.

The warrant authorized the search of McWebb and of the premises "known as 2036 Park Avenue third floor apartment." The property authorized to be seized included "Marijuana, related paraphernalia, monies, books, papers and photographs pertaining to the illegal distribution of marijuana."

The testimony of three police officers involved in the search must be recounted for a full

understanding of what took place on May 21 at the premises.

The infallibility of hindsight establishes that the police searched the right (McWebb's) and the wrong (Garrison's) premises. The difficulty arises in determining whether the warrantless Garrison search is sustainable despite the acknowledged mistake. We turn now to the testimony of Officers Russell Shea, Albert Marcus and Joseph Schanken.

Detective Shea testified that the front door to the premises was locked when the six officers arrived. He observed seven mail box slots with names, but none with the name "McWebb." A forced entry was unnecesary because McWebb drove up to the house and another officer advised him of the warrant. McWebb then unlocked the front door and the six officers present entered into the first floor hallway.

Without stopping, the entire group proceeded up the stairs to the third floor. The locked door at the top of the stairs was opened by McWebb, permitting the police to enter into a foyer with rooms to the left and to the right. According to Shea, immediately upon

entering the third floor he observed a man (Garrison), in a body cast and a pajama top, standing to the right side of the foyer. Shea testified that he did not observe any closed doors to his right or to his left. He did notice, from a distance of five feet, loose marijuana on a newspaper located on a dresser inside a doorway behind where Garrison was standing. The officers split up to conduct the search. Shea went to his left and began searching what was later established to be McWebb's bedroom. He recovered a revolver, marijuana, and two electric bills, one addressed to McWebb and the other to Garrison. He did not notice at the time, according to his account, that one of the utility bills was marked "3F" and the other "3R."

Shea then proceeded across the open foyer through an open doorway to a bedroom on the right side of the third floor entrance. He observed clothing hanging on the door which was opened back to the interior wall and, upon examination, found in the pockets of a jacket, syringes, a cap used for cooking heroin and five bundles of currency totaling $4,940.00. Shea then noticed that the door had a dead

bolt lock. Sergeant Schanken, who was also present, observed that the door to the left of the hallway had a similar lock. Schanken then ordered the search stopped, because it appeared that two apartments were involved. Shea maintained that all of the interior doors on the third floor were open when the police entered and that none of the doors had numbers identifying separate apartments.

Officer Marcus, based upon information supplied by an informant, prepared the warrant. The Baltimore Gas & Electric Company, Marcus stated, advised him that the third floor tenant was Lawrence McWebb. McWebb was accosted by Marcus outside of the building and ordered to unlock the front door and the door located at the top of the stairs on the third floor. Upon entering the third floor, Marcus observed a quantity of marijuana on a dresser in a room to his right and immediately proceeded into that area to seize the contraband. He, like Shea, placed Garrison in the foyer. Marcus recovered narcotics from several dressers in Garrison's room before he was advised by Sergeant Schanken to discontinue the search. In

preparing the inventory, Marcus did not separate the property taken on a room by room basis.

Detective Schanken was the officer in charge during the search. He saw Garrison when the officers entered and directed him to go into the (McWebb) living room. Neither Garrison nor McWebb, according to Schanken, stated that the third floor contained separate apartments. In walking through the rooms while the search was in progress, Schanken saw two kitchens and two bathrooms and then halted the search.

Appellant Garrison testified that he was not in the hallway as testified to by the police, but remained in his apartment doorway with a police officer present. When the search of McWebb's apartment was completed, Garrison testified, he was taken to McWebb's living room while this apartment was searched. He had lived in the apartment since 1979 and McWebb moved in across the hall in 1981. Garrison asked one of the officers present, "What's going on man?" The only response he received was that another officer was directed to "watch me."

Contrary to the testimony of the three police officers, Garrison insists that the apartments are designated "3F" and "3R" by lettering on the door jambs inside the third floor foyer. [1] Garrison also contended that it was physically impossible to enter the foyer and see into his bedroom, because the door opening into the foyer opened to the right obscuring any view into the bedroom until the common door was closed.

McWebb's testimony corroborated Garrison's account of the entire episode. He added that he told Marcus that he lived in the "third floor rear" apartment. Based upon the conficting testimony the trial court made the following findings of fact:

> THE COURT:
>
> Yes. Now, the Defendant McWebb contends again that it was a general warrant. Now, Defendant argued that argument. That is the police knew or should have known that the Garrison apartment was separate and distinct from the apartment of Defendant McWebb. He further characterizes the testimony of police as perjured or unworthy of belief.

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[1] Photographs taken after the incident support this contention.

Now, the Court, based on what it finds to be critical evidence, makes the following findings of facts: One, that on May 21st, 1982, the police executed a search and seizure warrant for premises at 2036 Park Avenue, third floor apartment. Two, the police had reliable information to believe the Defendant McWebb resided in a third floor apartment, did not know of another apartment on the third floor. Now, while it was evidence that there were a number of apartments in the building, police were unaware where these apartments were located or the character of the building.

Three, the Defendant McWebb was detained outside of 2036 Park Avenue. With the keys furnished by him, the police gained entrance through a locked front door to the building, next to the door were seven mail boxes with bells, or indicated were bells under each mail box, but no names were reflected on any of the mail boxes. Further, McWebb's name was not visible on any of the mail boxes or any area adjacent thereto.

Next, the police were directed to the third floor by McWebb without any notice or knowledge of the layout of that area. Five, that entrance to the third floor was gained through a common marked door which gave no indication that there was more than one apartment located on said floor. There was no one to alert anyone to indicate that there were more than one apartment.

Next, that upon opening said door, police found the Defendant Garrison standing in his night clothes. Next, seven, upon entrance to the third floor, police saw an open door to the left later identified as McWebb's apartment, and also an open door to the right later identified as Garrison's apartment. In fact, no door was visible at the time the police entered and the police were unaware at that time that there were two apartments.

Eight, that from the position of the hallway area leading to the two apartments, the police saw and based on their expertise located on top of the dresser in an open room to the right, a quantity of marijuana. Entrance was made into that room later identified as the apartment of the Defendant Garrison where a police or the police found that over the front door or the door leading to that area articles of men's clothing.

No numbers were observed by police upon entering the apartment which would alert them to a separate apartment. The room was searched, and in the apartment of the Defendant Garrison was recovered a quantity of heroin and approximately four thousand dollars in cash.

Nine, also significant or significantly at the time, neither defendant Garrison nor Defendant McWebb indicated that there were two separate apartments on the third floor. Ten, that a copy of the search and seizure warrant was given to the

Defendant McWebb. The inventory listed all the evidence seized from both apartments without indicating which pieces of evidence were found in each location. Eleven, it is clear that there was a common door which could be opened at the time of the search affording access between the two apartments.

The evidence indicates that while each apartment or the occupant of each apartment could have privacy by locking this door, nevertheless, there was free access judging from all the evidence at the time the police arrived there between the two apartments, and that the Defendants so intended based on the evidence that has been submitted before me.

Now, first with respect to the inventory, the inventory related duties which must be carried out upon execution of a warrant under Maryland Rule 780 are considered ministerial. And assuming the search was valid and the entry was lawful, a failure to comply completely with such ministerial duties does not render the warrant defective. In this case it is clear what was taken as regarded to the inventory and the potential property rights of each of the parties who may be affected or protected.

Now, with respect to the search and seizure warrant. The general rule regarding the searches of multiple units for the purpose of satisfying the Fourth Amendment, searching two or more apartments in the same building, is no different

> than searching two or more completely separate houses. Probable cause must be shown for searching each house, or as the case may be, each apartment. However, there is an exception to this general rule where the multiple unit character of the premises is not externally apparent and is not known to the officer applying for or executing the warrant.
>
> It is clear that the warrant specified the premises to be searched as the third floor apartment of the Defendant McWebb, that the officers did not know that there was more than one apartment on the third floor and nothing alerted them of such a fact until after the search had been made and the items were searched. In view of these findings, the Court will deny the motion of each Defendant to suppress the evidence. All right.

As a reviewing court, we are obliged to accord due deference to the trial judge who, having seen and heard the witnesses, has a superior opportunity to determine the credibility of the witnesses, and to resolve contradictions in first line facts. Watson v. State, 35 Md. App. 381 (1977); Fidazzo v. State, 32 Md. App. 590 (1976); Maryland Rule 1086. It is clear from the trial judge's factual summary that he believed the police version of what took place and rejected the

contradictory testimony of McWebb and Garrison. Under Watson, supra, he was authorized to make that judgment.

The balance sheet on what the police knew, or by the exercise of reasonable diligence should have known, required careful consideration of the following factors:

1. The police knew an apartment building was involved; they saw seven mail boxes at the entrance to a three story building.

2. They reasonably concluded that McWebb occupied the entire third floor; Baltimore Gas & Electric stated that 2036 Park Avenue had service listed to McWebb, police records established that he lived at that address on the third floor.

3. No attempt was made to determine Garrison's status when he was first observed in the foyer; Garrison didn't say he had a separate apartment, but the police didn't make any inquiry concerning him.

4. The police answered Garrison's phone and the caller asked for "Red Cross," McWebb's street name.

5. Utility bills recovered in McWebb's apartment were addressed to McWebb and to Garrison, designated as "3F" and "3R"; the police didn't notice the distinction at the time.

6. McWebb made no mention of Garrison or his separate quarters. The trial judge did not believe that McWebb said he lived in "the rear."

7. All of the doors, left and right, inside the foyer were open; the court so found in assessing credibility.

8. The immediate examination of the premises for safety purposes disclosed that no one else was present; with McWebb and Garrison in custody, no exigency existed that precluded an orderly, systematic evaluation of the circumstances incident to the execution of the warrant.

Under these circumstances, is the search of Garrison's apartment sustainable?

Ordinarily, probable cause will not justify a warrantless entry into fixed premises. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Steele v. United States, 267 U.S. 498, 45 S.Ct. 414, 69 L.Ed. 757 (1925); Brown v. State, 15 Md. App. 584 (1972); Gilbert and Moylan, Maryland Criminal Law: Practice and Procedure, "The Plain View Doctrine," Ch. 34, Sec. 34.11. "Police agents, standing where they have a right to be, observing contraband in 'plain view' within fixed premises are not thereby justified in making an immediate entry and seizure; a

warrant is still necessary." Coolidge, supra, at 468. In the present case, the police were lawfully within the third floor premises, at least to the extent of the foyer. The warrantless search of Garrison's apartment, however, may not be sustained unless the facts accepted by the court fall within some recognized exception to the warrant requirement.

Search warrants directed against multiple occupancy structures are generally held to be invalid where the warrant fails to describe the subunit with that degree of particularity that precludes the search of other units within the building. Exceptions to the general rule include common occupancy, entire premises as suspect, and multi-unit character of premises not known or apparent. Minovitz v. United States, 298 F.2d 682 (D.C. 1962); 11 A.L.R.3d 1330. In this case we are concerned with the third exception; to wit, what the police knew or should have known.

In Thomas v. State, 50 Md. App. 286 (1981), we upheld the sufficiency of a warrant against an allegation that where an eleven story complex was involved and appellant's name was not included, the

warrant was too general. A charge that a warrant is not specific is the equivalent of stating that by due diligence the police knew, or should have known, that separate units were located at the premises to be searched.

We said that Maryland law required no greater specificity than that the warrant shall name or describe with reasonable particularity the building, apartment, premises or place to be searched. The police in Thomas did not conduct an indiscriminate search, but located the proper apartment and conducted the search. Accord, Butler v. State, 19 Md. App. 601 (1974), appellant rented room in a multi-unit building which he used as a "stash house." See also, United States v. Santore, 290 F.2d 51 (2d Cir. 1960), cert. denied, 365 U.S. 834, 81 S.Ct. 745, 5 L.Ed.2d 743 (1961).

We emphasized in Harris and Schmitt v. State, 17 Md. App. 484 (1973), that there is no formula for measuring particularity in describing premises subject to search; the adequacy depends on the facts and circumstances of each case. The State cites two

decisions of this Court that allegedly support, in principle, the legality of the search of Garrison's premises. [2] In Delly, the police were unaware that the house was a multi-family dwelling. Nothing was taken from the unoccupied apartments; the only evidence introduced came from appellant's quarters. Due to the outward appearance of the house, the police had no indication that more than one family unit occupied the premises. The Court, therefore, upheld the validity of the warrant, despite the fact that the officers searched premises other than appellant's.

The search warrant in Green was for the defendant and her apartment. The affidavit mistakenly referred to the apartment as being on the second floor. After discovering the error, the police entered the first floor apartment occupied by the defendant and carried out the search. The warrant was upheld. Unlike either Delly or Green, however, the search and seizure herein included both apartments. The facts found by the court in the

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2 Delly v. State, 30 Md. App. 391 (1976); Green v. State, 38 Md. App. 63 (1977).

present case, however, are sufficient to establish that the police had no reason to believe that the third floor contained more than one apartment. One locked door without any identifying numbers provided entry to the third floor. Several open doors immediately within revealed a living room to the left and a bedroom to the right. Baltimore Gas & Electric verification indicated one apartment. Appellant's assertion that seven mail boxes in a three story building is notice that more than one apartment is located on the third floor is pure speculation. Any combination of units is possible. One may require the police to be observant and to act reasonably; clairvoyance, however, is not required.

Several cases from other jurisdictions are instructive on the issue of the multiunit premises not apparent. In People v. Kinnebrew, 259 N.W.2d 662 (Mich. App. 1977), the Michigan Constitution, like Maryland's, [3] provided that warrants shall not issue

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[3] Md. Constitution, Art.26: That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming (Cont'd.)

without "particularity describing the place to be searched." The police informant purchased drugs in the upstairs apartment from an individual who had not been apprehended. The police were under the impression that the building was a single family unit. In executing the warrant the police discovered the defendant and the evidence in the downstairs apartment. The affidavit submitted in support of the request for the warrant made no mention of any downstairs activity. Acknowledging that the warrant was not sufficiently specific, the Michigan Court said:

> "In cases where the police were understandably misled that a house was a single dwelling unit, the courts have recognized an exception to the rule that evidence must be suppressed if the search warrant did not adequately describe the premises to be searched. The crucial inquiry in this type of case is whether the police made a good faith effort to accurately describe the premises." [4]

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or describing the place or the person in special, are illegal, and ought not to be granted.

[4] The Court cited cases collected in §8 of the annotation in 11 A.L.R.3d 1330 as expressing the majority view that: "Absent a finding by the trial court that the police officers knew or should have known when they obtained the search warrant that the building (Cont'd.)

The exception to the general rule was recognized in People of the State of Colorado v. McGill and Reiter, 528 Pac.2d 386 (1974), stating:

> "The fact that the police learned that the house was being used for multiple occupancy purposes after they gained entrance to the premises does not alter our conclusion (of constitutionality). When the police executed the warrant and discovered that the building was not a single family residence, they did not have to abandon their search and obtain a new warrant. The police procedure, in this case, was reasonable in view of the exigent circumstances. Had they elected to delay their search to obtain an amended warrant, they would have jeopardized the search and the loss of evidence of narcotics which are easily destroyed."

Search warrants need not be read with all the precision of a pedantic grammarian. We hold that the facts relied upon by the trial judge were sufficient to support his conclusion that the police could not reasonably have determined, prior to their entry, that the third floor at 2036 Park Avenue contained more

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involved was multi-unit in character, the warrant and resultant search and seizure have been held to be constitutionally permissible." People v. Johnson, 267 N.Y.S.2d 301 (1966).

than one apartment. The warrant, therefore, was not constitutionally defective.

Appellant's second contention is that "plain view," conceding the legality of the entry, will not justify the search of and seizure from Garrison's apartment. Appellant relies on our decision in Brown v. State, 15 Md. App. 584 (1972), which is a scholarly and comprehensive history of the doctrine articulated by Judge Moylan. The bottom line in Brown is "with respect to fixed premises, no amount of probable cause will justify an intrusion." Brown was arrested for theft, he declined a request by the officers present to search his residence. The police then proceeded to the home of Brown's landlady for the purpose of obtaining a description of the premises in order to obtain a search warrant. The landlady invited the officers into her home, and, pointing to an open door, said, "There's the room where Willie lives." From the hallway, a deputy sheriff saw a box in which he could see "in plain view" the stolen property. Without walking into the room, he reached in and seized the box and contents.

We said that there was no prior valid intrusion into Brown's room and, therefore, Brown's Fourth Amendment rights were violated. The police were on the outside looking in and, while they had a right to look, they had no corresponding right to enter and/or seize. We turn now to a consideration of Brown in light of the Supreme Court decision in Washington v. Chrisman, 455 U.S. 1, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982).

A university police officer stopped a student, Chrisman, who appeared to be underage and who was carrying a bottle of gin. When he was asked for identification, Chrisman said he could get the information from his room. The officer accompanied him and while standing in the doorway he observed a pipe and what he believe to be marijuana seeds on a desk in the room. The officer entered the room, confirmed that the seeds were marijuana and that the pipe smelled of marijuana. Chrisman and his roommate were advised of their rights, which they waived, and the roommate, when asked if other drugs were in the room, produced additional marijuana and

cash. The students consented to a search of their room which yielded a quantity of lysergic acid diethylamide (LSD). The roommate was convicted of possession of controlled dangerous substances following a denial of a suppression motion.

A divided Court held:

1. It is not unreasonable for a police officer, under the Fourth Amendment, as a matter of routine, to monitor the movements of an arrested person as his judgment dictates following an arrest;

2. Such surveillance is not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested, and accordingly the officer could, consistent with the Fourth Amendment, accompany the student to his dormitory room and enter the room upon observing suspected contraband in plain view, such entry from a public corridor not requiring a showing of exigent circumstances; and

3. The Fourth Amendment did not prohibit the seizure of the contraband which was in plain view, it being of no legal significance whether the officer was in the room, on the threshold, or in the hallway at the time he observed the contraband, since he had a right to be in any of these places as an incident of a valid arrest.

In dissenting, Justice White (joined by Justice Brennan and Justice Marshall) said the officer could only enter the residence of the arrested person to protect himself or to maintain control over the arrestee, and where the officer entered solely to confirm his suspicion relating to contraband therein, the Fourth Amendment rights of the arrestees were violated.

At first blush, the Court's opinion (Burger, C.J.) would seem to overrule Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), holding that plain view alone is never enough to justify the warrantless seizure of evidence. A more careful reading of the opinion, however, leads us to conclude that the sighting of the marijuana in plain view did not form the basis for the Court's conclusion that the seizure was justified. Rather, the Court construed the seizure to be proper for the reason that the officer had a right to be in the room with the arrestee and it was, therefore, not relevant that his observation was made from the doorway. The initial intrusion being valid, the later "plain view" seizure and consent search did not violate the arrestee's Fourth Amendment rights.

We decide, therefore, that neither Coolidge nor Brown are overruled by Chrisman.[5]

We recognize that the resolution of the present case cannot rest upon the fact that Garrison was unquestionably engaged in drug trafficking. Neither may we sanction a warrantless search of premises in violation of the Fourth Amendment. The trial court decided that "there was free access between the two apartments. . . and that the defendants so intended." The evidence to support that conclusion is that after gaining entrance to the third floor all the doors were open, Garrison was standing in the foyer, marijuana was visible in the room behind him, a phone call received in one of Garrison's rooms was intended for McWebb, no separate apartment numbers were visible, Garrison's utility bill was in McWebb's quarters, and no one present advised the police that the apartments were separate. Garrison was immediately placed in custody and taken to a room with McWebb. The

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5 Neither the Supreme Court of the State of Washington nor the Supreme Court of the United States engaged in a discussion of "exigent circumstances" in deciding Chrisman.

seizure of the marijuana at that point was incident to a lawful arrest.

This case does not present the usual common use involving separate bedrooms and a single kitchen and bath (People v. Gorg, 157 Cal. App.2d 515, 321 P.2d 143 (1958)); or two family occupancy where defendant is head of household (Sparks v. State, 142 P.2d 379 (Okla. 1943)). The court in the present case, we decide, could reasonably conclude that both persons seemed to be making themselves at home throughout the third floor. We are not unmindful of the fact that appellant accused the police of lying and distorting what appellant alleges to be the true facts. Credibility of the witnesses, however, is within the province of the trial court and not an appellant tribunal.

Upon the peculiar facts of this case, we hold that the trial court was not clearly erroneous in concluding:

1. That the police could not reasonably have discovered, prior to the time that the search was conducted and the contraband was observed and seized, that the third floor contained two separate apartments; and

2. That despite the designation of the third floor premises as "3F" and "3R," McWebb and Garrison treated the third floor as one apartment in common use.

The resulting search and seizure of the entire premises, therefore, do not violate appellant's Fourth Amendment rights. This decision does no violence to Brown, supra, which we recognize is still good law in Maryland.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

IN THE COURT OF APPEALS OF MARYLAND

No. 94

SEPTEMBER TERM, 1984

HAROLD GARRISON

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Eldridge
Cole
Rodowski
Couch
Morton, James C., Jr.
(retired, specially assigned)

JJ.

Opinion by Morton, J.

Filed: June 27, 1985

This case presents the question whether a search warrant particularly describing one apartment authorizes a search of an adjacent apartment and a seizure of goods therein, when police executing the warrant mistakenly believed that the search which they conducted was of the premises covered by the warrant.

On May 21, 1982, Detective Albert Marcus of the Baltimore City Police Department applied for a warrant to search the dwelling of Lawrence Meril McWebb. Detective Marcus alleged in an affidavit in support of a search warrant that he had met with a "proven Confidential Reliable Informant" who told him that McWebb was selling marijuana out of his third floor apartment at 2036 Park Avenue, in Baltimore City. Marcus alleged that he took the following actions to verify McWebb's address:

> "Upon receiving the above information from the proven confidential reliable informant your Affiant Detective Marcus went to the premises known as 2036 Park Avenue and found it exactly as the Informant had described as a three story brick dwelling with the numerials [sic]

> 2-0-3-6 affixed to the front of the premises. Further your Affiant made a check with the Baltimore Gas and Electric Company and discovered that the premises of 2036 Park Avenue third floor was in the name of Lawrence McWebb. Your Affiant Marcus then checked with the Baltimore Police Department and discovered that there was a subject by the name of Lawrence Merial [sic] McWebb, black male date of birth 12/20/31 with an address of 2036 Park Avenue third floor who had been arrested in the past with a B. of I. number of 108-147. According to arrest records the subject McWebb is described as being a black male 5'11" tall weighing 150 pounds. This was exactly as described by Informant."

When Marcus applied for the search warrant, he apparently believed that only one apartment occupied the entire third floor. The search warrant which was issued authorized the police to search for marijuana and related materials "on the person" and "on the premises" of "Lawrence Meril McWebb," at "2036 Park Avenue third floor apartment described as being a three story brick dwelling with the numerals 2-0-3-6 affixed to the front of same." Pursuant to the warrant, several Baltimore City police officers, including Marcus, Detective Russell Shea, and Sergeant Joseph Schanken searched the entire third

floor of 2036 Park Avenue. [1] As a result of the search, the officers seized evidence from two separate apartments on the third floor, McWebb's and Harold Garrison's, the defendant in this case.

Garrison was subsequently charged with violations of the Controlled Dangerous Substance Act, including Maryland Code (1957, 1982 Repl. Vol., 1984 Cum. Supp.), Art. 27, §286, possession of heroin with intent to distribute. Garrison moved to suppress the evidence seized from his apartment, arguing at a hearing on the motion "that the officers, not having a warrant for [his] apartment, had no right to go into that apartment and, furthermore, that they knew or should have known that . . . the apartment . . . was a separate apartment." Schanken, Shea and Marcus offered testimony regarding the manner in which the search was carried out. Garrison and McWebb offered testimony that substantially conflicted with the police account. Judge Thomas, presiding in the Circuit Court

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[1] A diagram of the third floor is set out in the appendix.

for Baltimore City, made the following findings of fact and denied the motion:

> "One, that on May 21st, 1982, the police executed a search and seizure warrant for premises 2036 Park Avenue, third floor apartment. Two, the police had reliable information to believe the Defendant McWebb resided in a third floor apartment, did not know of another apartment on the third floor. Now, while [there] was evidence that there were a number of apartments in the building, police were unaware where these apartments were located or the character of the building.
>
> "Three, the Defendant McWebb was detained outside of 2036 Park Avenue. With the keys furnished by him, the police gained entrance through a locked front door to the building, next to the door were seven mail boxes with bells, or indicating were bells under each mailbox, but no names were reflected on any of the mail boxes. Further, McWebb's name was not visible on any of the mail boxes or any area adjacent thereto.
>
> "Next, the police were directed to the third floor by McWebb without any notice or knowledge of the layout of that area. Five, that entrance to the third floor was gained through a common marked door which gave no indication that there was more than one apartment located on said floor. There was no one to alert anyone to indicate that there were more than one apartment.

"Next, that upon opening said door, police found the Defendant Garrison standing there in his night clothes. Next, seven, upon entrance to the third floor, police saw an open door to the left later identified as McWebb's apartment, and also an open door to the right later identified as Garrison's apartment. In fact, no door was visible at the time the police entered and the police were unaware at that time that there were two apartments.

"Eight, that from that position of the hallway area leading to the two apartments, the police saw and based on their expertise located on top of the dresser in an open room to the right, a quantity of marijuana. Entrance was made into that room later identified as the apartment of the Defendant Garrison where a police or the police found over the front door or the door leading to that area articles of men's clothing.

"No numbers were observed by police upon entering the apartment which would alert them to a separate apartment.[2] The room was searched, and in the apartment of the Defendant Garrison was recovered a quantity of heroin and approximately four thousand dollars in cash.

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[2] At the suppression hearing, Garrison offered photographs of the entrances to both apartments into evidence. The pictures showed "3R" beside McWebb's apartment door and "3F" beside Garrison's.

"Nine, also significant or significantly at the time, neither Defendant Garrison nor Defendant McWebb indicated that there were two separate apartments on the third floor. Ten, that a copy of the search and seizure warrant was given to the Defendant McWebb. The inventory listed all the evidence seized from both apartments without indicating which pieces of evidence were found in each location. Eleven, it is clear that there was a common door which could be opened at the time of the search affording access between the two apartments.

"The evidence indicates that while each apartment or the occupant of each apartment could have privacy by locking this door, nevertheless, there was free access judging from all the evidence at the time the police arrived there betwen the two apartments, and that the Defendants so intended based on tne evidence that has been submitted before me.

* * *

"Now, with respect to the search and seizure warrant. The general rule regarding the searches of multiple units for the purpose of satisfying the Fourth Amendment, searching two or more apartments in the same building, is no different than searching two or more completely separate houses. Probable cause must be shown for searching each house, or as the case may be, each apartment. However, there is an exception to this general rule where the multiple unit character of the

> premises is not externally apparent and is not known to the officer applying for or executing the warrant.
>
> "It is clear that the warrant specified the premises to be searched as the third floor apartment of the Defendant McWebb, that the officers did not know that there was more than one apartment on the third floor and nothing alerted them of such a fact until after the search had been made and the items were searched [sic]. In view of these findings, the Court will deny the motion of each Defendant to suppress the evidence." (Emphasis added).

Thus, despite its denial of the defense motions, the trial court determined that the warrant, on its face, was limited to McWebb's apartment.

Garrison proceeded to trial on a statement of facts with a plea of not guilty. On March 18, 1983, he was found guilty on the heroin charge and sentenced to a 15-year term of imprisonment.

Garrison appealed to the Court of Special Appeals, which affirmed the judgment of the trial court. Garrison v. State, 58 Md. App. 417, 473 A.2d 514 (1984). Garrison then filed a petition for a writ of certiorari which this Court granted.

The question presented here is readily resolved by an examination of elementary search and seizure and the uncontested facts of this case. Article 26 of the Maryland Declaration of Rights provides:

> "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grevious [grievous] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted."

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Article 26 is in pari materia with the Fourth Amendment. Potts v. State, 300 Md. 567, 576, 479 A.2d 135 (1985), and cases there cited.

As the Supreme Court has noted, except in special situations, "the entry into a home to conduct a

search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." Steagald v. United States, 451 U.S. 204, 211, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) (emphasis added). As the Court stated in Coolidge v. New Hampshire, 403 U.S. 443, 454-455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971),

> "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'"

See State v. Wilson, 279 Md. 189, 194, 367 A.2d 1223 (1977).

The Supreme Court commented in Walter v. United States, 447 U.S. 649, 656, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), that

> "[w]hen an official search is properly authorized - whether by consent or by the issuance of a valid warrant - the scope of the search is limited by the terms of its authorization. Consent to search a garage would not implicitly authorize a search of an

> adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers."

Maryland has also recognized that the scope of a search is limited by the terms of the warrant. See Wilson v. State, supra, 279 Md. at 194; Smith v. State, 33 Md. App. 407, 409, 365 A.2d 53 (1976).

With these principles in mind, we turn to those facts in this case which are uncontested. The State concedes, and the trial judge found, that the third floor of 2036 Park Avenue contained two separate and distinct apartments. The trial judge further found that the search warrant covered only the premises belonging to McWebb. It is undisputed that the police were authorized to search only one apartment, McWebb's; the warrant did not authorize the search of Garrison's apartment. There is no question as to the validity of the search warrant itself. No argument was made in this Court that any of the exceptions to the warrant requirement applied here. It is clear, therefore, that the police had no authority to cross the threshold of Garrison's apartment and seize evidence.

The same situation was addressed by the court in Keiningham v. United States, 287 F.2d 126 (2d Cir. 1960). In Keininghamn, police secured arrest warrants for several suspects and a search warrant for 1106 Eighteenth Street, N.W. The police entered this address through an open door but discovered none of the suspects in the house. The police lieutenant in charge of the search observed a "freshly cut" door between 1106 and 1108 Eighteenth Street. The lieutenant pushed on the door, which opened. The door led to the second floor rear porch of 1108 Eighteenth Street. The police saw the suspects inside 1108 Eighteenth Street and announced that they had arrest warrants. When the suspects began to run, the police forced open the door, arrested the suspects and seized various gambling materials. In reversing the convictions, the court explained (287 F.2d at 129):

> "The Government contends that, since appellants were using the two houses as a single unit, the search warrant for 1106 should somehow be construed to embrace 1108 as well. It seems to be the Government's theory that 1108 became part of 1106 because of the use to which the two houses were put by appellants. This contention is

> unsound. We know of no clause in the warrant issued extending the authority granted therein in the event of unforeseen circumstances, and it is well settled that search warrants must be strictly construed. The authority to search is limited to the place described in the warrant and does not include additional or different places."

See Flowers v. State, 88 Okla. Crim. 252, 202 P.2d 233 (1949) (warrant authorizing search of specific room in hotel cannot be used to search another separately occupied room). We have the same situation here. Police had a warrant to search McWebb's apartment. They had no warrant to search Garrison's. They had no justification for entering his premises, regardless of appearances.

At trial and on appeal, the State, citing cases in Maryland and other jurisdictions, artued that a "good faith" exception applies to the facts here. The cases cited by the State are simply inapposite. The State relied primarily on a principle adopted in United States v. Santore, 290 F.2d 51 (2d Cir. 1960), cert. denied, 365 U.S. 834, 81 S.Ct. 749, 5 L.Ed.2d 744 (1961). The State framed the rule discussed in that case as follows:

> "if the building in question from its outward appearance would be taken to be a single-occupancy structure and neither the affiant not other investigating officers nor the executing officers knew or had reason to know of the structure's actual multiple-occupancy character until execution of the warrant was under way, then the warrant is not defective for failure to specify a subunit within the main building. (brief at 16)."

The State recognizes, however, that the Santore situation is not what is presented here. In Santore, the warrant covered the premises searched; here, the warrant covered only McWebb's apartment. In its brief, the State comments: "Appellee realizes [that the cases cited] are not on all fours with the facts in this case as the police did search the 'right' apartment of McWebb and the 'wrong' apartment of [Garrison] . . . ." (Brief at 18). [3]

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[3] The Court of Special Appeals also recognized this fact: "The infallibility of hindsight establishes that the police searched the right (McWebb's) and the wrong (Garrison's) premises." Garrison v. State, 58 Md. App. 417, 420, 473 A.2d 514 (1984).

The other cases relied on also involve situations in which the warrant covered the premises searched. In all the cited Maryland cases the premises searched were precisely the ones described in the warrant. See e.g., Thomas v. State, 50 Md. App. 286, 437 A.2d 678 (1981), cert. denied, 292 Md. 639 (1982); Delly v. State, 30 Md. App. 391, 352 A.2d 331, cert. denied, 278 Md. 720, cert. denied, 429 U.S. 833, 97 S.Ct. 96, 50 L.Ed.2d 97 (1976); Butler v. State, 19 Md. App. 601, 313 A.2d 554, cert. denied, 271 Md. 732 (1974). Similarly, in State v. Hymer, 400 So.2d 637 (La. 1981); State v. Ventry, 439 So.2d 1144 (La. App. 1983); People v. Kinnebrew, 75 Mich. App. 81, 254 N.W.2d 662 (1977); State v. Schumann, 156 N.J. Super. 563, 384 A.2d 201 (1978); State v. Hendricks, 145 N.J. Super. 27, 336 A.2d 999 (1976); and State v. Woodard, 35 N.C. App. 605, 242 S.E.2d 201 (1978), the courts determined that the search conducted was within the scope of the warrants, each of which authorized a search of an area larger than the premises occupied by the defendants. The State here attempts to turn this allowance of an imprecise description of premises into a "good faith

exception" to the warrant requirement. The analogy simply does not work. The warrant in the instant case precisely and unambiguously described the premises to be searched: McWebb's apartment. The police then expanded the search to a second apartment not described or mentioned in the warrant.

Garrison's motion to suppress the evidence should have been granted.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED, AND THE CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AND REMAND THE CASE FOR A NEW TRIAL.

COSTS TO BE PAID BY BALTIMORE CITY.

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Mellish

POLICE DEPARTMENT
BALTIMORE, MARYLAND

2036 Ayer Ave 3rd Floor

State's Motion Exhibit #3
(Diagram of 3rd Floor)

JT EXT. 29

HAROLD GARRISON	*	IN THE
	*	COURT OF APPEALS
v.	*	OF MARYLAND
	*	No. 94
STATE OF MARYLAND	*	September Term, 1984

* * * * * *

MANDATE

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS the case of Harold Garrison v. State of Maryland came before you and wherein the judgment of the said Court of Special Appeals was duly entered on the tenth day of April, 1984 as appears from the transcript of the record of the said Court of Special Appeals which was brought into the Court of Appeals of Maryland by virtue of a writ of certiorari dated September 11, 1984; and

WHEREAS in the September Term, 1984 the said cause came on to be heard before the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on June 27, 1985 by this Court that the judgment of the Court of Special Appeals be reversed, and case remanded to that Court with instructions to reverse the judgment of the Circuit Court for Baltimore City and remand the case for a new trial. Costs to be paid by Baltimore City.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the cause in conformity with the judgment of this Court as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS The Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland, this third day of September, 1985.

Alexander L. Cummings (s)
Clerk,
Court of Appeals of Maryland

Costs:	Petition filing fee	$ 30.00
	Appellant Brief	273.60
	Joint Record Extract	1017.60
	Appellee Brief	153.60

July 12, 1985: Motion for reconsideration filed by appellee.

Sept. 3, 1985: Motion for reconsideration denied.

EDITOR'S NOTE

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In The

Supreme Court of the United States

October Term, 1985

STATE OF MARYLAND,

Petitioner,

v.

HAROLD GARRISON,

Respondent

On Petition For A Writ of Certiorari To The Court of Special Appeals of Maryland

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI

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Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980)	5

MISCELLANEOUS

Search Warrant: Sufficiency of Description of Apartment or Room to be Searched in Multiple-Occupancy Structure, 11 A.L.R. 3d 1330	3

ROOP & RUKLAND, P.A.
COURT SQUARE BLDG.
BALTIMORE, MD. 21202

No.

In The

Supreme Court of the United States

October Term, 1985

STATE OF MARYLAND,

Petitioner,

v.

HAROLD GARRISON,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI

STATEMENT OF FACTS

The Respondent accepts and incorporates by reference the Petitioner's Statement of the Case as the relevant facts in this case.

QUESTIONS PRESENTED FOR REVIEW

Whether a Search Warrant particularly describing one apartment authorizes the warrantless search and seizure from an adjacent apartment not described in the Search Warrant.

ARGUMENT

A Search Warrant which particularly describes one apartment does not authorize the search and seizure from an adjacent apartment not described in the Search Warrant.

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BALTIMORE, MD 21202

It is uncontested that the search of the Respondent's apartment was conducted without a search warrant. The police had obtained a warrant to search the person and premises of McWebb. No probable cause had been presented in the affidavit for the search warrant to search either the person or the premises of the Respondent.

As this Court has noted, "the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." Steagald v. United States, 451 U.S. 204, 211, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981)(emphasis added). "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically delineated exceptions." Coolidge v. New Hampshire, 403 U.S. 443, 454-455, 91S.Ct. 2022, 29 L.Ed.2d 564 (1971). Therefore, the warrantless search of the Respondent's apartment may not be sustained unless it falls within one of the recognized exceptions to the warrant requirement.

The Petitioner has not argued that any exception to the warrant requirement applies in the instant case. Instead, the Petitioner would have this Court carve a new exception to the warrant requirement permitting officers to conduct warrantless searches whenever they have a reasonable, but mistaken belief, they are searching an area authorized by a search warrant. In support of this novel exception to the warrant requirement, the Petitioner has correctly noted certain general search and seizure principles, but also has misunderstood and/or misapplied the holdings of this Court and other Courts when applying these principles. A dissection of Petitioner's arguments is necessary to demonstrate Petitioner's misplaced reliance on the cases cited by the Petitioner as authority for this novel, and unsupported, exception to the warrant requirement.

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The Petitioner recognizes and accepts that the Fourth Amendment requires that all warrants shall "particularly describ[e] the place to be searched," and that a sufficient description of the place to be searched occurs when an officer "can, with reasonable effort, ascertain and identify the place to be searched." Steele v. United States, 267 U.S. 498, 503, 45 S.Ct. 414, 416, 69 L.Ed. 757 (1925). Having recognized the particularity requirement of the Fourth Amendment, the Petitioner would have us ignore it by allowing searches of areas not authorized to be searched by a warrant.

Reviewing courts have upheld searches when the descriptions of the place to be searched were inaccurate when the police ultimately arrive at the proper area to be searched. What the Petitioner ignores is that the validity of the warrant itself was under attack in these cases - that the warrant failed because of the lack of a sufficient description. But in all cases the warrant covered the premises searched. None of the cases support the Petitioner's argument that the warrants authorized the search of and seizure from areas not described in the warrant. [1]

Thus, when a warrant describes a particular place to be searched, the reviewing courts have not invalidated a search merely because inaccuracies in the description of the place to be searched caused both the "wrong", an area not described, and the "right", the area described, to be searched. In the instant case, the supporting affidavit for the warrant presented to the issuing magistrate sufficient probable cause to issue a warrant

1 See, Annotation: Search Warrant: Sufficiency of Description of Apartment or Room to be Searched in Multiple-Occupancy Structure 11 A.L.R. 3d 1330 and cases cited therein.

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to search the premises and person of McWebb. There was no prior judicial approval of the search of the Respondent's apartment. The police had authority to search McWebb's apartment; they had no authority to search the Respondent's apartment. The Court of Appeals of Maryland did not err, as Petitioner contends, when it held that the police improperly expanded the scope of the search warrant for McWebb's apartment by searching Respondent's apartment. Authority dictates otherwise.

The Petitioner contends that Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971), supports his theory that the reasonableness of an officer's mistake may be considered in upholding a warrantless search. Petitioner's reliance is misplaced. In Hill the police had neither an arrest or a search warrant when they went to Hill's apartment to arrest him. The police went to Hill's apartment and arrested the man who answered the door, Miller. The police then, without a warrant, searched Hill's apartment. During the search the police seized, among other items, a diary written by Hill which was offered as evidence against him. This Court upheld the search of Hill's apartment because, under the law at the time of the search, the search of the apartment was permissable as a search incident to arrest. The police had probable cause to arrest Hill and therefore "the police were entitled to do what the law at that time allowed them to do if Miller had in fact been Hill, that is to search incident to arrest and to seize evidence of the crime the police had probable cause to believe Hill had committed." 401 U.S. at 804.

Hill, supra, has limited, if any, application because of this Court's rulings in Chimel v. California 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) and Payton v. New York, 445 U.S. 573, 100S.Ct. 1371, 63 L.Ed.2d 639 (1980). The search incident to arrest permitted in Hill would not pass the narrowed

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BALTIMORE MD 21202

permissable scope of searches as announced in Chimel. Chimel would not allow the police to search Hill's entire apartment without a warrant.

Neither would the arrest of Miller in Hill's apartment without a warrant be permitted because of this Court's ruling in Payton, supra. "[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." 445 U.S. at 585-586. (Citing United States v. United States District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L. Ed2d 752). Only by requiring that the warrant procedure be followed before arresting an individual in him home can the public be protected from unreasonable intrusions.

As discussed, supra, the Petitioner has argued for the condoning of a warrantless search by presenting decisions in which reviewing courts have upheld search warrants under attack for failing to particularly describe the place to be searched when evidence sought to be suppressed came from the area directed to be searched by the warrant. That the Petitioner is really seeking is not for this Court to condone the warrant per se, but to condone a search conducted outside the area described by the warrant. Ignoring that the warrant specified that the area to be searched was the third floor apartment of McWebb, the Petitioner seeks to expand the scope of the search to an area not specified - Respondent's apartment. The warrant was specific. The warrant limited the area to be searched to McWebb's apartment.

This Court said in Walter v. United States, 447 U.S. 649, 656, 100 S.Ct. 2395, 65 L.Ed2d 410 (1980) that

> "[w]hen an official search is properly authorized - whether by consent or by the issuance of a valid warrant - the scope of the search is limited by the terms of its authorization. Consent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers." (emphasis added).

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BALTIMORE, MD. 21202

Thus the warrant authorizing the search of McWebb's apartment limited the area to be searched; it did not allow the search of the Respondent's apartment. Each individual in his own home, be it a shack or a castle, has a reasonable expectation of privacy. In the United States today, millions of persons live in buildings with multiple living quarters. Each is entitled to his own privacy. A warrant to search one subunit within a single building does not authorize the search of another subunit. See Flowers v. State, 88 Okla. Crim. 252, 202 P.2d 233 (1949) (warrant authorizing search of specific room in hotel cannot be used to search another separately occupied room). The Court of Appeals of Maryland correctly observed that a warrant to search one subunit does not permit the search of another subunit. Their decision did not invalidate searches of a subunit when the police erroneously enter a wrong premise before locating the proper premise; it only invalidated searches of premises not specified in the warrant. If the Court of Appeals erred in any fashion, it was only in not dictating that police, when they are aware of the multiple occupancy of a structure, have a duty to ascertain with more certainty the location within a building of a particular person's residence. If they had done so in this case, only McWebb's apartment would have been searched because they would have known which apartment was his. The police in the instant case made no attempt to ascertain the exact apartment of McWebb. It is true that they contacted the Baltimore Gas & Electric Company in an attempt to verify that McWebb had a third floor apartment. But they made the inquiry not to ascertain the exact apartment belonging to McWebb, thus preventing unwarranted intrusions into the apartments of others, but only to verify the information from an informant that McWebb lived on the third floor. As more and more old single family homes are turned into multi-residence dwellings, as well as the number of apartment dwellings are built, the need for the police to ascertain the

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exact location of a particular person's apartment becomes increasingly important to avoid the unwarranted intrusions into the homes of persons not subject to police investigation, thus upholding and protecting our valuable Fourth Amendment right to be free from unreasonable searches.

CONCLUSION

The Fourth Amendment protects our basic right to be free from unreasonable searches and seizures and further requires that all warrants be particular and supported by probable cause. The Court of Appeals of Maryland upheld the Fourth Amendment by ruling that the search of the Respondent's apartment was unreasonable because the warrant did not authorize the search of his apartment. There was no probable cause presented to a neutral and detached magistrate requesting authority to search the Respondent's apartment. There was no warrant authorizing the search of the Respondent and his apartment. The Petitioner seeks to have this Court ignore the Fourth Amendment's requirements by allowing searches of premises not authorized by a warrant. The Court of Appeals of Maryland refused to ignore the dictates of the Fourth Amendment as requested by the Petitioner. It upheld that searches without a warrant are presumptively unreasonable. The Petitioner has not presented any sound justification for creating a new exception to the warrant requirement. Therefore, it respectfully is submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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RECEIVED
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SUPREME COURT, U.S.

November 14, 1985

85-759

Clerk,
Supreme Court
of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

RE: State of Maryland v. Harold Garrison
October Term, 1985
Waiver, Motion to Proceed on Appeal
In Forma Pauperis
Affidavit in Support of Motion to
Proceed on Appeal In Forma Pauperis

Dear Sir/Madam:

Please find enclosed the above captioned pleadings which I would appreciate your filing on behalf of the Defendant, Harold Garrison.

Very truly yours,

Gerald A. Kroop

Gerald A. Kroop

GAK/cs
Enclosures
cc: Stephen H. Sachs,
Deborah K. Chasanow,
Attorney General's Office

Supreme Court, U.S.
FILED
MAY 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MARYLAND,

Petitioner,

v.

HAROLD GARRISON,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

JOINT APPENDIX

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**Counsel of Record*

Petition for Certiorari Filed November 1, 1985
Certiorari Granted February 24, 1986

48 pp

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No. 85-759

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF MARYLAND,

Petitioner

v.

HAROLD GARRISON,

Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

JOINT APPENDIX

CHRONOLOGY

Date	Event
May 21, 1982	Search and seizure pursuant to Warrant
October 29, 1982	Indictment
December 2, 1982	Motion to Suppress filed

March 2-3, 1983	Hearing on Motion to Suppress
March 17, 1983	Motion to Suppress denied
March 18, 1983	Trial and Sentencing
March 18, 1983	Order for Appeal
April 10, 1984	Opinion of the Court of Special Appeals filed
May 25, 1984	Respondent Garrity's Petition for Writ of Certiorari filed
September 11, 1984	Certiorari granted by Court of Appeals
June 27, 1985	Opinion of the Court of Appeals filed
July 12, 1985	Petitioner State of Maryland's Motion for Reconsideration filed

September 3, 1985	Denial of Motion for Reconsideration and Mandate filed
November 1, 1985	State of Maryland's Petition for Writ of Certiorari filed
February 24, 1986	Certiorari granted

WHAT MAY BE FOUND IN THE APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

Opinion of the Court of Special Appeals of Maryland filed April 10, 1984.....1 APC

Opinion of the Court of Appeals of Maryland filed June 27, 1985.....28 APC

Diagram of 2036 Park Avenue, Third Floor, Exhibit at Motions Hearing.....44 APC

SUPREME BENCH
OR
DISTRICT COURT OF MARYLAND
DISTRICT I
BALTIMORE CITY

Operations Bureau
Application for Search and Seizure Warrant
Police Department Form 77/188

To the Honorable Judge I. Sewell Lamdin of the District Court of Maryland: the undersigned being duly sworn deposes and says that he has reason to believe that on the person of Lawrence Meril McWebb, described as a black male, date of birth 12/20/31, B. of I. #108-147, 5'11" tall, weighing about 150 pounds, a.k.a. "Red Cross," [and] that on the premises known as 2036 Park Avenue third floor apartment, Baltimore, Maryland described as a three story brick dwelling with the numerals 2-0-3-6 affixed to the front in the City of Baltimore there is now being concealed certain property, namely: Marihuana, related paraphernalia monies books photographs and papers pertaining to the illegal distribution of marihuana which is in violation of the Laws of Maryland pertaining to the illegal storing, concealing and selling of Marihuana in violation of the Narcotic Laws of Maryland pertaining to Article 27 Sections 276 through 302 of the Annotated Code of Maryland.

AND that the facts tending to establish grounds for issuance of Search Warrant are set forth in the Affidavit attached thereto and made a part thereof.

WHEREFORE your affiant prays that a Search and Seizure Warrant be issued for said Lawrence Meril McWebb, black male, date of birth 12/20/31, described as being 5'11" tall, weighing 150 pounds, B. of I. 108-147, a.k.a. "Red Cross," 2036 Park Avenue third floor apartment, Baltimore, Maryland described as being a three story brick dwelling with the numerals 2-0-3-6 affixed to the front of same.

DET. ALBERT MARCUS /s/

Detective, Baltimore Police Department

SWORN to before me and subscribed in my presence this 21st day of May 1982.

I. SEWELL LAMDIN /s/,
Judge.

AFFIDAVIT

Affidavit in support of a search and seizure warrant for the person of:

Lawrence Meril McWebb, described as a black male with a date of birth of 12/20/31, about 5'11" tall, weighing about 150 pounds, B. of I. number 108-147 with a street name of "Red Cross".

For the premises of:

2036 Park Avenue, third floor apartment Baltimore, Maryland. Described as a three story brick dwelling with the numerals 2-0-3-6 on a wood plack affixed to the front of the building.

By:

Detective Albert Marcus who is a duly Constituted member of the Baltimore Police Department and has been a Police Officer for over seven (7) years during which time your Affiant has worked both uniform and plainclothes. Your Affiant Marcus has been the arresting or investigating officer in the arrest of over 800 eight hundred individuals for various violations of the narcotic laws of Maryland. Your affiant Marcus has been the Affiant for over seventy (70) search and seizure warrants and at the time of execution of those warrants various amounts of heroin, cocaine, P.C.P., L.S.D., Valium, and Marihuana were seized. Your Affiant Marcus has attended and successfully completed both the three day seminar and the two week course on Controlled Dangerous Substances and its violators sponsored by the drug enforcement administration. Your Affiant Marcus is familiar with the methods of manufacturing, packaging, concealing and storing and selling of Controlled Dangerous Substances and also familiar with the terminology used in those illegal transactions.

During the third week of May 1982 (between May 16, 1982 and May 21, 1982) your Affiant Marcus met with a proven Confidential Reliable Informant (herein referred to as Informant PC #222) who is known to your Affiant and is considered to be reliable due to the fact that this informant PC #222 has been supplying Information to the police. As a result of this Information two (2) search and seizure warrants for narcotics were obtained and at the time of execution various amounts of Controlled Dangerous Substances were seized. Additionally six (6) search and seizure warrants for crimes against property were obtained and at the time of execution various stolen goods were

5/21/82 JSL

AFFIDAVIT PAGE TWO

seized. As a result of those eight (8) search and seizure warrants a total of twelve (12) individuals were arrested for violations of the narcotics laws of Maryland and for violation relating to Burglary. thus far ten (10) of those individuals arrested have been tried and found guilty the remaining two (2) are presently awaiting trial in the Criminal Court system of Baltimore City. This Informant PC #222 has supplied information to Detective Constantain as recently as the third week of May 1982 (between May 16, 1982 and May 21, 1982) and this information when check was found to be true and correct to the best of Det. Constantain's knowledge and that investigation is continuing. This Informant PC #222 is a drug user and is familiar with the methods of packaging, concealing, storing and selling of Controlled Dangerous Substances and also familiar with the terminology used in those illegal transactions.

During the above mentioned meeting with Informant #222, the Informant stated that he/she knew a subject by the name of "Red Cross", who was selling Marihuana out of his apartment located at 2036 Park Ave. third floor. The Informant PC#222 went on to describe the subject "Red Cross" as a black male about 5'10" to 5'11" tall thin build about fifty (50) years of age and described the premises of 2036 Park Ave. as being a brick dwelling and having the numbers on the front of the building. Informant PC #222 went on to say that he/she knew this to be true due to the fact that the Informant PC#222 has known the subject "Red Cross" for over six months and during that time the Informant PC#222 states that he/she would go to the premises of 2036 Park Ave. and ring the front bell. The subject "Red Cross" would answer the front door and ask the Informant how much Marihuana he/she wanted to purchase. The Informant PC#222 would advise the subject "Red Cross" of the amount of Marihuana desired the subject "Red Cross" would then invite the Informant PC#222 up into his third floor apartment. At that time the Informant states that the subject "Red Cross" would give the Informant the amount of Marihuana he/she requested and the Informant would hand the subject "Red Cross" the amount of money required. The Informant PC#222 states that he/she has purchased Marihuana from the subject "Red Cross" within the last twenty four (24) hours of this affidavit for his/her own personal use. The Informant went on to say that he/she knew the substance purchased from the subject "Red Cross" to be Marihuana

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AFFIDAVIT PAGE THREE

due to the fact that when the Informant PC#222 smoked the substance purchased from "Red Cross" that he/she reached the same euphoric effect that the Informant PC#222 has obtained in the past from the use of Marihuana.

Upon receiving the above information from the proven confidential reliable informant PC#222 your Affiant Detective Marcus went to the premises known as 2036 Park Avenue and found it exactly as the Informant PC#222 had described as a three story brick dwelling with the numerals 2-0-3-6 affixed to the front of the premises. Further your Affiant made a check with the Baltimore Gas and Electric Company and discovered that the premises of 2036 Park Ave. third floor was in the name of Lawrence McWebb. Your Affiant Marcus then checked with the Baltimore Police Department and discovered that there was a subject by the name of Lawrence Merial McWebb, black male date of birth 12/20/31 with an address of 2036 Park Ave. third floor who had been arrested in the past with a B. of I. number of 108-147. Acording to arrest records the subject McWebb is described as being a black male 5'11" tall weighing 150 pounds. This was exactly as described by Informant PC#222,

A photograph of the subject Lawrence Meril McWebb B. of I. 108-147, was obtained and showned to Informant PC#222 at which time the Informant PC #222 positively identified the subject and stated that it was a photograph of the same subject "Red Cross" from who he/she purchased Marihuana from as recently as within the last twenty four hours.

No controlled and supervised purchase of Marihuana was requested of the Informant or attempted due to the fact that the apartment is located on the third floor of the premises and it would be impossible to keep the Informant under constant observation during the purchase thus making the purchase tainted. Additionally no observations of the apartment were conducted due to the fact that it would again be impossible to tell which apartment the individuals would enter.

Your Affiant Detective Albert Marcus feels that sufficient probable cause exist in that the subject Lawrence Meril McWebb is using, renting or occupying the premises of 2036 Park Avenue third floor apartment for the purpose of ilegally concealing, storing, and selling of Controlled Dangerous Substances in Violation of the

5/21/82 ASL

AFFIDAVIT PAGE FOUR

narcotic laws of Maryland based on the Information supplied by the confidential reliable informant PC#222, and pray that a Search and Seizure Warrant be issued for the above named and described person and premises.

DET. ALBERT MARCUS /s/

Affiant Det. Albert Marcus

SWORN to before me and subscribed to in my presence this 21st day of 1982.

I. SEWELL LAMDIN /s/,
Judge.

SUPREME BENCH
OR
DISTRICT COURT OF MARYLAND
DISTRICT I
BALTIMORE CITY

Operations Bureau
Search and Seizure Warrant
Police Department Form 77/187

To: Any Police Officer of Baltimore City:

Affidavit having been made before me by Detective Albert Marcus, Baltimore Police Department, Narcotic Unit, that he has reason to believe that on the person of Lawrence Meril McWebb, described as a black male, date of birth 12/20/31, B. of I. #108-147, 5'11" tall, weighing 150 pounds, a.k.a. "Red Cross," [and] that on the premises known as 2036 Park Avenue third floor apartment, described as a three story brick dwelling with the numerals 2-0-3-6 affixed to the front of same in the City of Baltimore, there is now being concealed certain property, namely: Marihuana, related paraphernalia, minies, books, papers, and photographs pertaining to the illegal distribution of Marihuana which is in violation of the Laws of Maryland pertaining to the illegal storing, concealing, and selling of Marihuana in violation of the Narcotic Laws of Maryland pertaining to Article 27 Sections 276 through 302 of the Annotated Code of Maryland and I am satisfied that there is probable cause to believe that the property so described is being concealed on the person/premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are therefor commanded, with the necessary and proper assistants, to search forthwith the person/premises hereinabove described for the property specified, executing this warrant and making the search; and if the property be found there, to seize it, and if upon execution of this warrant, there are found persons then and there engaged in the commission of a crime, arrest those so participating; leaving a copy of this warrant with an inventory of the property seized and returning copy of said warrant and inventory, if any, to me within five days after execution of this warrant; or, if not served, to return this warrant to me within five days after its expiration, as required by law.

Dated this 21st day of May, 1982.

Signed I. SEWELL LAMDIN /s/,
Judge.

May '82

At the time of execution of the attached search and seizure warrant Lawrence McWebb was stopped outside of the premises and walked up to the third floor. As the key was placed into the lock of the third floor the door was opened by Harold Garrison Jr. who was dressed in night clothes. Upon entering the premises it gave the appearance of being one apartment with all doors being open giving free access all the way through the entire third floor. Closer inspection revealed that the third floor was equiped to accommodate two seperate apartments with a living room, bedroom, kitchen and bathroom in the front part and the same in the rear part. Located in the rear bedroom of Lawrence McWebb was papers in the name of Harold Garrison. While at the premises the telphone rang in the front bedroom (Harold Garrison) when answered the subject on the phone asked for "Red Cross" who is Lawrence McWebb and had a seperate telephone in his rear bedroom.

Based on the appearance upon entering, and evidence recovered in the bedroom of Lawrence McWebb it is believed that although the third floor is divided into two seperate apartments both McWebb & Garrison have free access to the entire third floor and share a common interest in both apartments.

5/24/82 JSL

TRANSCRIPTS

Testimony at Motions Hearing
March 2, 1983

[M. 13-29]

DETECTIVE RUSSELL SHFA

DIRECT EXAMINATION BY MRS. HOCHBERG, ASSISTANT STATE'S ATTORNEY:

Q. Were you working on the 21st of May, 1982?

A. Yes, ma'am.

Q. Did you have occasion to execute a search and seizure warrant for the premises 2036 Park Avenue?

A. Yes.

Q. Is that in Baltimore City?

A. Yes, ma'am.

Q. Who was the warrant for?

A. It was for Lawrence McWebb, also known as Red Cross, and the premises of 2036 Park Avenue, third floor.

Q. What kind of premises is it?

A. It's in a group row home, three stories, broken down into apartments.

Q. And at the time of the warrant, before the execution, did you know how many apartments were contained in the premises?

A. No, ma'am.

Q. Could you please describe how the apartment is set up, regarding the front door and how you get in and out.

A. At this time, the 21st of May, we were going to conduct a search with a search and seizure warrant. There is a common door you have to open. Apparently all the residents have keys. Then you have to go up a series of steps to go up to the third floor. We didn't want to knock down that door.

Q. Which door?

A. The main common door. Apparently, the other people in the apartment wouldn't have security. Number two, if the person on the third floor heard the door knocked in, he might destroy the evidence.

Q. Was that front door locked?

A. Yes.

Q. Was there any mail boxes on the first floor?

A. Yes.

Q. Did you have occasion to look at them?

A. Yes. I put a type of construction hard hat on as a ruse and I went there, hoping someone on the first floor would open that door. As I came in the front door, there is a series of several mailboxes, like apartment mailboxes. There are seven individual mailboxes. On the bottom is a bell for each mailbox. Above the bell is a slot to see if you have any mail. And above that are names of the residents.

Q. Were you able to see the names clearly on the mailboxes?

A. When I looked the 21st of May, I was looking for Mr. McWebb's name because that's the bell I didn't want to ring. I wanted to ring somebody on the first floor, but I couldn't figure out where the first floor bells were, so I rang all seven of them.

Q. Why couldn't you figure out where the first floor bells were?

A. At the time they weren't marked and I didn't know anybody's name on the first floor.

Q. Were there any numbers indicating the various apartments?

A. Not that I can see.

Q. In the meantime, did you see Mr. McWebb's name listed on the mailbox?

A. No, ma'am.

Q. For that matter, did you see anybody's name by the name of Garrison on the mailbox?

A. I don't recall if I did.

Q. Do you know whether there is an apartment in the basement?

A. That I really don't know.

Q. So far as you know, do you know how many apartments were on each floor?

A. In all there were — All I know, there were seven mailboxes and seven bells. There was another

bell over to the side. I imagine it was the original bell before the place was split up into apartments.

Q. Above any of the mailboxes did you see any numbers?

A. I couldn't figure out any numbers at all.

Q. Did you eventually gain entrance into the apartment?

A. I rang all the bells. No one answered the door. I knocked on the door. No one answered the door.

Q. Did you have occasion to finally enter the apartment?

A. Yes. Mr. McWebb pulled up in a car. Detective Marcus had the tag number. By this time I had gained access. The rest of the raid party came around to the car. Mr. McWebb pulled up. He parked his car. He opened the front door and we went up the steps with him and he opened the third floor door.

Q. Could you please describe the setup on the third floor.

A. You go up the steps. On a normal row house steps, they go on angles. You go all the way up the steps, there is a wooden door. Mr. McWebb put his key in and opened his door. When you go in through the door, you go into what I call a foyer area. I have a diagram. You go into a hallway or foyer area. After Mr. McWebb opened that door up, Mr. Garrison was standing in the hallway area in pajamas and half a body cast.

Q. All right. Would you please detach that.

A. Sure.

MRS. HOCHBERG: For purposes of the motion, I'd like to have the diagram marked as State's Exhibit Number 2.

(Shown to defense counsel.)

MR. POLANSKY: May I have a moment to look at this to see if I make an objection.

Thank you.

(Diagram was thereupon marked as State's Motion Exhibit Number 2 in evidence).

BY MRS. HOCHBERG:

Q. By the way, as you were entering the apartment, did you stop on any of the other floors?

A. No, ma'am.

Q. Do you know how many apartments were on each and every floor?

A. No, ma'am.

Q. When you got to the third floor, you said—

A. Mr. McWebb had a set of keys. I don't recall if I opened the door or someone did, but the door became open with the use of a key.

Q. Would you please describe the setup of the apartment on the third floor?

A. You walk in and you're in this little hallway or foyer area. You look to the left and you can see all the way to the very far wall on the house. You look to the right, you look through, and I saw a bedroom and a bed and a dresser and that was the other side of the home, the front and the back of the house.

Q. How many doors were there to get into the apartment itself?

A. There was that one main door, that which we opened with the use of Mr. McWebb's key. The rest of the apartment, if you looked up, you can see any way you looked.

Q. How many doors were there to get into the apartment?

A. Just that one main common door downstairs all the way up, and I didn't see any more doors.

Q. When you finally get to the third floor and open up the common door and get into the hallway door, how many other doors are there to get into the apartment?

A. At the time I looked in, I didn't see any.

Q. You didn't see any doors at all?

A. No.

Q. Can you please describe what you saw.

A. I looked to the left and I saw what looked like a living room-dining room area.

Q. The living room, dining room. Were the premises eventually identified?

A. Yes. Mr. McWebb's living room-dining room area.

Q. That is the left side?

A. Yes.

Q. What else did you see?

A. To the right I saw a bedroom. I looked through a doorway and saw a little foyer and — I looked through and saw a foyer, a double bed and a dresser in the bedroom.

Q. Were there any doors when you originally looked through?

A. I didn't see any originally.

Q. Did you eventually determine if there was a door?

A. Yes, there was a door.

Q. Could you please describe how the door is situated.

A. As I am looking from the little foyer area into that bedroom, the door was swung all the way to the back and there were some clothes hanging over it.

Q. In other words, the door didn't open into the hallway?

A. It opened into the bedroom. I couldn't see it when I originally looked.

Q. Continue. What else did you see?

A. There were some clothes hanging on the door. It took me a little while to find it. When I took the clothes off, I found it had a dead bolt lock on it.

Q. Could you see the lock on the door?

A. No, I didn't see it until I took the clothes off.

Q. Do you remember if there were any numbers on the door?

A. I don't recall seeing any numbers on the door, no.

MRS. HOCHBERG: If I can have Detective Shea mark the diagram.

Q. Detective Shea, I am going to show you what's been marked as State's Exhibit Number 2, the diagram. Could you please mark what you have just described. You said there were two doors once you walk into the hallway. Could you please describe what you saw to the left side?

A. To the left side it was a doorway, but I couldn't see a door because the door was pushed back.

Q. All the way back?

A. Yeah, from my view.

Q. I do see a line there. Does that indicate a door?

A. Yes, it is.

Q. Was that the position of the door?

A. The door was all the way against this back wall.

Q. Will you draw a line indicating the position of the door. Could you also mark as to whose apartment that was identified as.

A. Mr. McWebb's.

Q. Okay. Could you describe what you saw to the right side.

A. There is a doorway. This door was all the way against this wall here. This is —

Q. It's already been marked.

A. Yes, ma'am.

Q. Is that the door where the clothing was covering?

A. Yes. It was hanging from the top of the door on clothes hangers.

Q. During your search of that apartment, what, if anything, unusual happened?

A. Mr. Garrison had a telephone sitting on his dresser in his bedroom and it rang. So I answered it, and I just said hello. They said, is —

MR. POLANSKY: Objection.

THE COURT: Well, he said hello. Okay. Ask the next question.

BY MRS. HOCHBERG:

Q. What happened next?

MR. POLANSKY: Objection, Your Honor.

MRS. HOCHBERG: Your Honor, I think it is important to know the state of mind of the officers.

MR. POLANSKY: Actually not as to what somebody said on the phone. It is absolutely hearsay. At this point the question is, number one, whether the officers had any business being there and, secondly what his authority was to answer someone else's phone and, thirdly, assuming that you get by all that, what that unknown person said on the other end of the phone is certainly not admissible testimony. It is crucial at this point.

THE COURT: Well, do you want to say anything?

MRS. HOCHBERG: Yes, Your Honor. The issue is whether the officers knew or should have known that they were in another person's apartment where they had no business to be. The contents of the conversation were crucial as to the officer's understanding. It goes directly to the state of mind. Therefore it does come under the exception to the hearsay rule.

THE COURT: I am going to overrule the objection. You may tell us.

THE WITNESS: A female said, "Is Red Cross there?" And I said —

THE COURT: I didn't hear what you said.

THE WITNESS: A female said, "Is Red Cross there?" I said "No, he is in the bathroom." She said "Okay. I will call back." And I hung up the phone.

BY MRS. HOCHBERG:

Q. Do you know who Red Cross is?

A. That is the street name for Mr. McWebb.

Q. Did you find any evidence?

MR. POLANSKY: Objection. Totally above and beyond the scope of this motion, Your Honor.

MRS. HOCHBERG: There is a motion to suppress the evidence.

THE COURT: I am going to overrule the objection. I am not ruling on the motion anyway.

THE WITNESS: As I originally looked from the foyer hallway, which I described earlier, through that

door, which I didn't know was there, and into Mr. Garrison's bedroom, right on his dresser, the closer corner to the door was within less than four feet was a piece of newspaper and approximately a half ounce of brown leafy substance piled on that. From my experience I would suspect that to be marijuana.

BY MRS. HOCHBERG:

Q. What else was found in this apartment?

A. Also he had like, I call it a chest of drawers, but the first three are like — like a chest. They are open. They are shelves and the other two or three are drawers. In that was found ten glass[i]ne bags containing white powder and was turned over to the crime laboratory and tested and found to be schedule one.

THE COURT: Let's back up. You say the chest was — where was it when you opened the door?

THE WITNESS: The chest was against the wall here and it was like — the first three of them were shelves. You opened doors like this and the other two

or three drawers you pull out. I don't know what you call that.

THE COURT: Where did you find the glass[i]ne bags?

THE WITNESS: They were in the drawer, Your Honor.

BY MRS. HOCHBERG:

Q. What else did you find, if anything?

A. Marijuana cigarette. If I can refer to my notes. Marijuana cigarette was found on top of the dresser.

Q. Continue.

A. One manila envelope containing suspected marijuana, a green leafy substance, found in the bedroom in the dresser drawer, the top drawer of that thing I just described. Also there is a closet in Mr. Garrison's apartment where that door was resting against. I moved that door and opened the closet. There was an army field jacket, several suits of clothes and other leather jackets, stuff like that. I

searched through every pocket and I got to the army field jacket. I always feel the pockets before I put my hand in because I don't want to be stuck with a syringe or razor blade. And so I felt a bulge. I opened the coat and pulled out a paper bag. I unrolled the paper bag and there was five bundles of money, money folded in half with rubber bands around it. I counted the money. It was —

MR. POLANSKY: Objection, Your Honor.

THE COURT: Overruled.

BY MRS. HOCHBERG:

Q. Will you tell us how [much] money it was.

A. $4,940.

Q. Did you find any other —?

A. Also in that coat was a plastic bag containing three syringes and one cooker cap, the cap used to cook heroin for injection; also another cooker cap with suspected heroin residue was found in another coat in the same closet.

Q. Will you continue.

A. There was some personal papers, a couple of pieces of mail in Mr. Garrison's room.

Q. Is that the first place you searched?

A. No, ma'am.

Q. Where did you search first?

A. I went into Mr. McWebb's bedroom.

Q. Okay. Which side of the apartment was that as you enter on to the third floor?

A. To your left.

Q. When you entered, what, if anything, did you find and do?

A. I opened the top dresser drawer and I found a thirty-eight revolver and several shells loaded in the weapon. Also I found two gas and electric bills, one in the name of Mr. McWebb and one in the name of Mr. Garrison.

MR. POLANSKY: Objection, Your Honor.

THE COURT: Overruled.

MR. POLANSKY: Also I add to that the sufficiency of the warrant to it.

THE COURT: All right.

BY MRS. HOCHBERG:

Q. You found two gas and electric bills in the names of —?

A. Mr. McWebb and Mr. Garrison.

Q. Where was this found?

A. It was found in the top drawer of Mr. McWebb's dresser.

MR. POLANSKY: I also object to this. Obviously this testimony is being presented to prejudice the Court. I really protest, Your Honor, to the manner in which it is being presented.

THE COURT: All right.

BY MRS. HOCHBERG:

Q. What other evidence did you find, if anything?

A. Several pieces of personal mail and things like that in the top drawer. Also found — he had like a desk or a table in the right-hand corner. On that was a large plastic bag containing suspected marijuana and a

smaller plastic bag containing suspected marijuana. Also on the floor was a triple beam scale.

THE COURT: A what?

THE WITNESS: A triple beam scale.

THE COURT: What is that for?

THE WITNESS: It is used to weigh out drugs.

BY MRS. HOCHBERG:

Q. What else was found? Is this all the evidence you found in Mr. McWebb's apartment?

A. Also $310.00 of United States currency was found in that top dresser drawer, a paper bag with the name Red Cross written on it — It was an Avon bag — four papers in the name of Mr. McWebb on the bedroom table, which I described earlier, a box of paper was found on that same rear bedroom table, several large plastic bags containing suspected marijuana residue, a small telephone book. That's all.

Q. Were there any marijuana cigarettes found?

A. In the rear living room there was an ashtray full of numerous partially smoked marijuana

cigarettes.

I went in the kitchen and found a pie plate and put them in the pie plate so they wouldn't spill out.

Q. Was there any other marijuana on the premises?

A. That's all.

MRS. HOCHBERG: At this time the State would introduce on the motion the photographs indicating the evidence seized and chemical analysis just for purposes of the motion.

MR. POLANSKY: Just so it is clear, Your Honor, we are objecting to this not only regarding specifically different amounts but, again, because the inventory — there is no evidence at all regarding where or what was found and I submit it should be suppressed.

THE COURT: Overruled.

(Lab report and photos were thereupon marked as State's Motion Exhibit No. 3 in evidence.)

BY MRS. HOCHBERG:

Q. Detective, at any time did you come to determine that there was actually two apartments that you had entered instead of one?

A. Yes ma'am.

Q. Will you please describe that.

A. When I found that door I described earlier with the dead bolt lock on it, Sergeant Schanken was standing right near me. He saw it also. So I had gone through the hallway to the other side and he looked at this other door, Mr. McWebb's apartment door, this one right here, and he looked at it, and that also had the type of lock you have on your outside door, your entrance door. He told us to stop searching then.

Q. Do you know whether he walked through the apartment itself, the entire apartment?

A. Yes, he did.

Q. What, if anything, did he do that you know of in your presence?

A. He went to Mr. Garrison's phone and dialed 396-1757 and asked for John Prevas.

Q. The State's Attorney?

A. Yes.

Q. Do you know whether he spoke to Mr. Prevas?

A. He had a conversation with him.

* * * *

March 3, 1983

[M2. 52-55 and M2. 78]

DIRECT EXAMINATION OF DETECTIVE ALBERT MARCUS BY MR. POLANSKY, DEFENSE ATTORNEY

Q. Detective Marcus, May 21, 1982, you had an occasion to execute a warrant at 2036 Park Avenue, correct?

A. Yes, I did.

Q. I show you State's Exhibit Number 1. Is this the warrant, sir?

A. Yes, that is the original warrant, that's correct.

Q. Are you the affiant on this warrant?

A. Yes.

Q. Are you the only affiant on this warrant?

A. That's correct.

Q. You prepared the warrant?

A. That's correct.

Q. Now, you are totally familiar with the warrant; is that correct?

A. Yes, sir.

Q. Now, you were aware, having written that warrant, that 2036 Park Avenue was a multi-family dwelling or number of apartments there; is that correct?

A. That is correct.

Q. Did you know how many apartments were there?

A. No, I did not. I just wrote the warrant for the third floor.

Q. Just for the third floor?

A. That's correct.

Q. Just for the third floor?

A. That's correct.

Q. Did you ever, prior to writing that warrant, did you ever go out there and look at that house?

A. I looked at the structure, that's correct.

Q. How many floors was it?

A. Three floors.

Q. Did you ever look at — did you ever walk up to the third floor?

A. No.

Q. Did you ever look at the mail box?

A. No, I did not.

Q. You then checked with B.G. and E. Electric Company; is that correct?

A. That's correct.

Q. What did they tell you?

A. They told me it was listed — there was a listing on it to a Mr. Lawrence McWebb.

Q. A listing to what?

A. To the gas and electric that was in his name.

Q. For what, sir?

A. For the third floor apartment.

Q. Is that what they told you? Do you recall, before you look at that, do you have a recollection?

A. Yes, that is what I recollect.

Q. Did you check the records? Did you call down there? How did you ascertain that?

A. I called over the phone.

Q. You called over the phone?

A. That's correct.

Q. Do you know who you spoke to?

A. No, I do not.

Q. You are now aware that there were two apartments on that third floor?

A. That's correct but — no, I am not aware of that. When I called the gas and electric and I ascertained an apartment, I asked if there is a front or rear or middle room. They told me, one third floor was only listed to Lawrence McWebb.

Q. Is that right?

A. That's correct.

Q. Did you ever get anybody's name that you

spoke to over there?

A. No, I didn't.

Q. Where did you call, sir?

A. It is a special number we call, 264-2364.

Q. You checked the computer and you found it was only listed to Mr. McWebb?

A. Yes.

Q. You are positive of that?

A. I am positive.

Q. You had no idea that Harold Garrison lived up there?

A. That's correct.

Q. He is not mentioned in the warrant in any way, shape or form?

A. That's correct.

* * * *

CROSS-EXAMINATION BY MRS. HOCHBERG:

Q. Agent Marcus, when you called the BG & E Company, what was your intention?

A. To find out who the third floor was listed to.

Q. At any time did they tell you it was more than one apartment?

A. No, they didn't. When I asked for the third floor apartment, I said, is anybody listed in either front or rear? They tell you if it is listed because they have it broken down that way.

* * * *

March 3, 1983

[M2. 167-168]

CROSS-EXAMINATION OF SERGEANT JOSEPH SCHANKEN

BY MRS. HOCHBERG:

Q. Detective, on the day of the raid, at any time did Mr. Garrison or Mr. McWebb indicate there were two separate apartments in the building at any time?

A. I don't believe so, no.

Q. When did you determine that there were two separate apartments?

A. It was later on. The officers were searching and I was standing in the room with the defendants.

Q. Which room is that, by the way?

A. It was the living room to the left, Mr. McWebb's it would have been. And at that point I started to walk throughout the third floor and making sure that the search was being conducted right, to see what was going on, and at that point I was standing in the back half of the house and I took notice that there was a kitchen there, a living room, and then I went into the bedroom and I noticed that there was a bathroom in there. And then I walked towards the front of the house, and I was standing there, and I looked around and I noticed — I walked into the other living room — noticed there was another living room and then also noticed that there was another kitchen, and then when I went into the other bathroom, I was positive that at that point it could have possibly been two apartments, and at that time I had the officers stop the search immediately.

Q. Before that nobody — none of the defendants indicated to you that there was an apartment, rear and front?

A. No, they didn't.

* * * *

March 17, 1983

[T. 17-21]

TRIAL COURT'S RULING

THE COURT: Lady and gentlemen, the Court has before it a motion to suppress evidence in this case. The Defendant Garrison contends that there was no warrant to search his apartment, therefore, the items seized were illegally seized and such evidence should be suppressed. The Defendant McWebb contends that the warrant was a general warrant as it did not specify which apartment was to be searched on the third floor, and therefore, anything seized in his apartment should also be suppressed.

As I understand your argument, Mr. Polansky, —

MR. POLANKSY: Just for the record, we also allege with respect to Garrison that it is a general warrant. We would make an objection on that ground, please.

THE COURT: Yes. Now, the Defendant McWebb contends again that it was a general warrant. Now, Defendant argued that argument. That is the police knew or should have known that the Garrison apartment was separate and distinct from the apartment of the Defendant McWebb. He further characterizes the testimony of police as perjured or unworthy of belief.

Now the Court, based on what it finds to be critical evidence, makes the following findings of facts: One, that on May 21st, 1982, the police executed a search and seizure warrant for premises 2036 Park Avenue, third floor apartment. Two, the police had reliable information to believe the Defendant McWebb resided in a third floor apartment, did not know of another apartment on the third floor. Now, while it was evidence that there were a number of apartments in the building, police were unaware where these apartments were located or the character of the building.

Three, the Defendant McWebb was detained outside of 2036 Park Avenue. With the keys furnished by him, the police gained entrance through a locked front door to the building, next to the door were seven mail boxes with bells, or indicating were bells under each mailbox, but no names were reflected on any of the mailboxes. Further, McWebb's name was not visible on any of the mail boxes or any area adjacent thereto.

Next, the police were directed to the third floor by McWebb without any notice or knowledge of the layout of that area. Five, that entrance to the third floor was gained through a common marked door which gave no indication that there was more than one apartment located on said floor. There was no one to alert anyone to indicate that there were more than one apartment.

Next, that upon opening said door, police found the Defendant Garrison standing there in his night clothes. Next, seven, upon entrance to the third floor, police saw an open door to the left, later identified as

McWebb's apartment, and also an open door to the right later identified as Garrison's apartment. In fact, no door was visible at the time the police entered and the police were unaware at that time that there were two apartments.

Eight, that from that position of the hallway area leading to the two apartments, the police saw and based on their expertise located on top of the dresser in an open room to the right, a quantity of marijuana. Entrance was made into that room later identified as the apartment of Defendant Garrison where a police or the police found over the front door or the door leading to that area articles of men's clothing.

No numbers were observed by police upon entering the apartment which would alert them to a separate apartment. The room was searched, and in the apartment of Defendant Garrison was recovered a quantity of heroin and approximately four thousand dollars in cash.

Nine, also significant or significantly at the time, neither Defendant Garrison nor Defendant McWebb indicated that there were two separate apartments on the third floor. Ten, that a copy of the search and seizure warrant was given to the Defendant McWebb. The inventory listed all the evidence seized from both apartments without indicating which pieces of evidence were found in each location. Eleven, it is clear that there was a common door which could be opened at the time of the search affording access between the two apartments.

The evidence indicates that while each apartment or the occupant of each apartment could have privacy by locking this door, nevertheless, there was free access judging from all the evidence at the time the police arrived there between the two apartments, and that the Defendants so intended based on the evidence that has been submitted before me.

Now, first with respect to the inventory, the inventory related duties which must be carried out

upon execution of a warrant under Maryland Rule 780 are considered ministerial. And assuming the search was valid and the entry was lawful, a f lure to comply completely with such ministerial duties does not render the warrant defective. In this case it is clear what was taken as regarded to the inventory and the potential property rights of each of the parties who may be affected or protected.

Now, with respect to the search and seizure warrant. The general rule regarding the searches of multiple units for the purpose of satisfying the Fourth Amendment, searching two or more apartments in the same building, is no different than searching two or more completely separate houses. Probable cause must be shown for searching each house, or as the case may be, each apartment. However, there is an exception to this general rule where the multiple unit character of the premises is not externally apparent and is not known to the officer applying for or executing the warrant.

It is clear that the warrant specified the premises to be searched as the third floor apartment of the Defendant McWebb, that the officers did not know that there was more than one apartment on the third floor and nothing alerted them of such a fact until after the search had been made and the items were searched. In view of these findings, the Court will deny the motion of each Defendant to suppress the evidence. All right.

* * * *

Supreme Court, U.S.
FILED
MAY 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-759 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MARYLAND,

Petitioner,

v.

HAROLD GARRISON,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF FOR PETITIONER

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41 pp

QUESTION PRESENTED

Does the Fourth Amendment require suppression of heroin seized from Respondent's adjoining apartment during execution of a warrant for another person's third floor apartment when the police reasonably believed that there was only one third floor apartment, both when applying for the warrant and during its execution?

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Scaffold: But was it a Fair Trial?"
22 Am.Cr.L.Rev. 85 (1984) 5

No. 85-759

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF MARYLAND,

Petitioner

v.

HAROLD GARRISON,

Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 303 Md. 385, 494 A.2d 193 (1985). The opinion of the Court of Special Appeals of

Maryland is reported at 58 Md. App. 417, 473 A.2d 514 (1984).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The Court of Appeals of Maryland denied the Motion for Reconsideration on September 3, 1985.

The Petition for Writ of Certiorari was filed in this Court on November 1, 1985.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searchs and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On May 21, 1982, Baltimore City Police Officers found heroin in the bedroom of Respondent's third floor apartment at 2036 Park Avenue (J.A. 25). At the time, they were executing a search and seizure warrant for both Respondent's neighbor, Lawrence

McWebb, and the third floor apartment at the Park Avenue address (J.A. 9, 11). The police did not learn, until after they discovered the heroin, that there were indeed two third floor apartments at 2036 Park Avenue and that they had been searching both simultaneously. Respondent was charged with violation of Maryland's controlled dangerous substances law as a result of the execution of the warrant. He moved to suppress the fruits of the search and seizure on the ground that his Fourth Amendment rights had been violated.

Based on the affidavit and application for the search warrant and on the testimony at the suppression hearing, the following facts were established. A confidential, reliable informant advised Baltimore City Police Detective Albert Marcus, between May 16 and 21, 1982, that a person named "Red Cross" was selling marijuana from his third floor apartment at 2036 Park Avenue and that the informant had purchased marijuana from that person within the prior 24 hours (J.A. 6). Detective Marcus, who was trained in investigating narcotics violations, obtained a description of Red Cross and the apartment building from the informant.

He identified 2036 Park Avenue as a three-story brick dwelling with the numerals 2-0-3-6 on the front and verified that it fit the description given by the informant (J.A. 7, 35). He then contacted the Baltimore Gas and Electric Company to find out who occupied the third floor apartment. He was told the apartment was in the name of Lawrence McWebb[1] (J.A. 7, 35). Detective Marcus then found that a Lawrence McWebb had an arrest record with the Baltimore City Police on which the description matched that given by the informant. Finally, he took the picture of that Lawrence McWebb to the informant who identified him as the man he knew as "Red Cross." (J.A. 7).

Armed with that information, Detective Marcus sought a search and seizure warrant for McWebb and his apartment. The affidavit recited the foregoing

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[1] At the suppression hearing, Detective Marcus explained that he called the number for the Baltimore Gas and Electric computer to ask to whom the third floor apartment was listed. He said: "I asked if there is a front or rear or middle room. They told me, one third floor was only listed to Lawrence McWebb." (J.A. 36-38).

data and stated that no controlled buy or further observations were attempted because of the difficulty in observing activities to and from a particular apartment within the building (J.A. 7).

District Court Judge I. Sewell Lamdin issued the warrant for both McWebb and for "2036 Park Avenue third floor apartment." At 3:00 p.m. that afternoon, the warrant was executed by Detective Marcus and five other Baltimore City police officers.

Upon arrival at the apartment building, one officer went to the front door to attempt to gain entry (J.A. 12-13). He saw seven mailboxes, but saw neither numbers, letters nor McWebb's name. No one answered when he rang all seven bells (J.A. 13-15).

Fortuitously, McWebb drove up, was detained by the police and advised of the search warrant (J.A. 15). His key was used to open the front door and everyone proceeded up the stairs to the third floor (J.A. 15). The locked door at the top of the stairs was also opened by McWebb's key (J.A. 16). Inside, they entered a foyer with rooms to the left and right (J.A. 18-19). The doors to those rooms, which opened to the

inside, were open and clothes were hanging from them (J.A. 20). Respondent Harold Garrison, dressed in night clothes, was standing to the right side of the foyer (J.A. 16). McWebb and Garrison were placed in the living room to the left, attended by one officer (J.A. 38-39).

The other officers separated to search the premises. Some searched what turned out to be Respondent's apartment and others searched McWebb's. They found a revolver, marijuana, two electric bills,[2] syringes, a cap for cooking heroin, currency totalling over $5,000.00, eleven packets of heroin, and other paraphernalia (J.A. 25-31). During the search, neither Respondent nor McWebb questioned the search of the entire floor or indicated that there were two apartments (J.A. 38, 39-40). One detective answered the phone in what turned out to be

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[2] The electric bills in McWebb's and Respondent's names indicate apartments "3FL R" and "3FL F." Detective Shea picked them up as evidence of ownership of the premises, but did not look at the names at that time. At the end of a search, the officers typically review the paperwork to determine which documents to take and which to leave (M2. 29-31).

Respondent's bedroom and the caller asked for "Red Cross." (J.A. 22-24).

It was not until one of the officers had walked throughout the entire third floor and saw two kitchens that any officer suspected that there might be two apartments. The search was halted immediately (J.A. 39). Afterwards, as part of the return, the officer recounted what happened at the time of the search (J.A. 10).

The trial court denied the motions to suppress filed by both Respondent and McWebb based on the following findings of fact:

> "Now the Court, based on what it finds to be critical evidence, makes the following findings of facts: One, that on May 21st, 1982, the police executed a search and seizure warrant for premises 2036 Park Avenue, third floor apartment. Two, the police had reliable information to believe the Defendant McWebb resided in a third floor apartment, did not know of another apartment on the third floor. Now, while it was evidence that there were a number of apartments in the building, police were unaware where these apartments were located or the character of the building.
>
> "Three, the Defendant McWebb was detained outside of 2036 Park

Avenue. With the keys furnished by him, the police gained entrance through a locked front door to the building, next to the door were seven mail boxes with bells, or indicating were bells under each mailbox, but no names were reflected on any of the mailboxes. Further, McWebb's name was not visible on any of the mail boxes or any area adjacent thereto.

"Next, the police were directed to the third floor by McWebb without any notice or knowledge of the layout of that area. Five, that entrance to the third floor was gained through a common marked door which gave no indication that there was more than one apartment located on said floor. There was no one to alert anyone to indicate that there were more than one apartment.

"Next, that upon opening said door, police found the Defendant Garrison standing there in his night clothes. Next, seven, upon entrance to the third floor, police saw an open door to the left, later identified as McWebb's apartment, and also an open door to the right later identified as Garrison's apartment. In fact, no door was visible at the time the police entered and the police were unaware at that time that there were two apartments.

"Eight, that from that position of the hallway area leading to the two apartments, the police saw and based on their expertise located on top of the dresser in an open room to the right, a quantity of marijuana. Entrance was made into that room

later identified as the apartment of Defendant Garrison where a police or the police found over the front door or the door leading to that area articles of men's clothing.

"No numbers were observed by police upon entering the apartment which would alert them to a separate apartment. The room was searched, and in the apartment of Defendant Garrison was recovered a quantity of heroin and approximately four thousand dollars in cash.

"Nine, also significant or significantly at the time, neither Defendant Garrison nor Defendant McWebb indicated that there were two separate apartments on the third floor. Ten, that a copy of the search and seizure warrant was given to the Defendant McWebb. The inventory listed all the evidence seized from both apartments without indicating which pieces of evidence were found in each location. Eleven, it is clear that there was a common door which could be opened at the time of the search affording access between the two apartments.

"The evidence indicates that while each apartment or the occupant of each apartment could have privacy by locking this door, nevertheless, there was free access judging from all the evidence at the time the police arrived there between the two apartments, and that the Defendants so intended based on the evidence that has been submitted before me." (J.A. 41-44).

Thereafter, Respondent was convicted at a bench trial of possession of heroin with intent to distribute it. He was sentenced to 15 years imprisonment. On direct appeal to the Court of Special Appeals, the judgment was affirmed, that Court concluding (1) "that the facts relied upon by the trial judge were sufficient to support his conclusion that the police could not reasonably have determined, prior to their entry, that the third floor at 2036 Park Avenue contained more than one apartment." (APC 20-21), and (2) that the court "could reasonably conclude that both persons seemed to be making themselves at home thoughout the third floor." (APC 26).

On certiorari review, the Court of Appeals of Maryland reversed the judgments of the lower courts, finding that Respondent's motion to suppress should have been granted. It concluded that "the warrant . . . precisely and unambiguously described the premises to be searched: McWebb's apartment. The police then expanded the search warrant to a second apartment not described or mentioned in the warrant." (APC 43). The State's motion for reconsideration was denied without opinion.

SUMMARY OF ARGUMENT

Evidence is suppressed under the Fourth Amendment only if it was the fruit of an unconstitutional search or seizure and the exclusionary rule applies. The constitutional standard of reasonableness allows for objectively reasonable good faith factual mistakes. The search warrant for the third floor apartment occupied by Lawrence McWebb based upon the understandable mistaken belief that there was only one third floor apartment, was valid. The search of Respondent's apartment resulted from the misinformation supplied by a utility company and the misleading appearances during the police entry. The police reasonably believed they were searching a place covered by the warrant. The search was, thus, constitutional. Even were it not, however, the exclusionary rule would not apply because the officers acted in objectively reasonable reliance on the warrant.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT REQUIRE SUPPRESSION OF HEROIN SEIZED FROM RESPONDENT'S ADJOINING APARTMENT DURING EXECUTION OF A WARRANT FOR ANOTHER PERSON'S THIRD FLOOR APARTMENT WHEN THE POLICE REASONABLY BELIEVED THAT THERE WAS ONLY ONE THIRD FLOOR APARTMENT, BOTH WHEN APPLYING FOR THE WARRANT AND DURING ITS EXECUTION.

Suppression of evidence under the Fourth Amendment in a criminal case requires an affirmative answer to two distinct questions: first, was there an unconstitutional search or seizure, and second, if so, should the exclusionary sanction be applied. United States v. Leon, __ U.S. __, 104 S.Ct. 3405, 3412, 82 L.Ed.2d 677, 688 (1984).[3] In this case, the answer to the first question is no. Even were there some illegality, however, the answer to the second question would still be no. As a result, there would be no cause to suppress the evidence.

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[3] A defendant's standing or right to assert the violation may also be questioned, Rakas v. Illinois, 439 U.S. 128 (1978).

In analyzing the second question, this Court recently concluded that, assuming an unconstitutional search and seizure, the exclusionary rule would not apply when the police acted in the objectively reasonable belief that their action was constitutional, such as in reliance on a subsequently invalidated search warrant. Leon, supra; Massachusetts v. Sheppard, ___ U.S. ___, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). Simply analyzed in that fashion, it is easy to conclude that the evidence in this case should not have been suppressed: the police were acting in an objectively reasonable belief that the search was validly authorized by the warrant. That easy answer, however, fails to explain why the exclusionary rule does not apply here. It does not draw the proper and necessary distinction between constitutional, albeit mistaken, behavior by the police, and the good faith exception to the exclusionary rule for objectively reasonable, but unconstitutional, searches and seizures.

There are important reasons to distinguish between a mistake not amounting to a Fourth

Amendment violation and an unconstitutional action that is nevertheless objectively reasonable. First, the police should not be deprived of the clearest possible guidance for future behavior simply because the result in the criminal case (i.e. non-suppression of evidence) may be the same regardless of which rationale is used. Leon, __ U.S. at __, 104 S.Ct. at 3422. Second, the question of civil liability under 42 U.S.C. §1983 parallels this distinction. City of Los Angeles v. Heller, __ U.S. __ (No. 85-531, filed April 21, 1986).

If there was no constitutional violation, no cause of action can be stated and the claim should be dismissed, Rodriguez v. Ritchey, 556 F.2d 1185, 1190 and 92 (5th Cir. 1977). If the mistaken judgment results in an unconstitutional action, the officer will be entitled only to qualified immunity if the judgment was nevertheless objectively reasonable, Malley v. Briggs, __ U.S. __, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271, 281 (1986). That determination is only made after a defendant has pleaded objective good faith and the issue (whether the asserted unconstitutional actions violated clearly established constitutional rights of

which a reasonable person would have known) has been presented on summary judgment or otherwise. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); Mitchell v. Forsyth, 472 U.S. ___, 105 S.Ct. 2806, 86 L.Ed.2d 411, 425-26 (1985).

Finally, the good faith exception itself is not only controversial, but raises a host of new questions about its appropriate reach. See, e.g., S. Wasserstrom and W. Mertens, "The Exclusionary Rule on the Scaffold: But was it a Fair Trial?," 22 Am.Cr.L.Rev. 85, 118-22 (1984) (Will subjective bad faith or unreasonableness defeat the exception?); S. Sachs, "The Exclusionary Rule: A Prosecutor's Defense," 1 Crim.J. Ethics, 28, 32 (1982) (premium on police ignorance will "depress Fourth Amendment compliance to the level of our tolerance for the lowest standards of the least informed officer.") It is unnecessary to grapple with such issues when the conduct does not violate the Constitution.

The difference between constitutional and unconstitutional good faith mistakes is this: if the mistake is simply one of fact (e.g. there is only one

third floor apartment), which, if true, would render the search unquestionably constitutional, then the search was constitutional. On the other hand, if the mistake leads to an improper legal conclusion (e.g. there was probable cause), then there has been an unconstitutional search and the objective reasonableness or good faith of the officer must be examined.[4]

That not every use of the term "good faith" in describing a police officer's conduct necessarily invokes the good faith exception to the exclusionary rule is illustrated by prior cases where that term or its equivalent was used long before Leon and Sheppard in determining whether a Fourth Amendment violation had even occurred. The term was used in Hill v. California, 401 U.S. 797, 803-04 (1971),[5] in concluding

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[4] A similar distinction is noted in W. LaFave, 1 Search and Seizure, §1.2 (1978, 1986 Suppl. at 8-9).

[5] Respondent may well be correct that the search in Hill was unconstitutional under Chimel v. California, 395 U.S. 752 (1969) and Payton v. New York, 445 U.S. 573 (1980). That does not alter the continued validity of the central principle that an arrest made because of a good faith mistake in identification is reasonable under the Fourth Amendment.

that the police had probable cause to arrest Miller because they mistakenly (but in good faith) believed him to be Hill, for whom they had probable cause to arrest. This was but a recognition that the Fourth Amendment does not require perfection:

> "[T]he officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." (Emphasis added).

Similarly, in Michigan v. DiFillippo, 443 U.S. 31, 33 (1979), an arrest was valid when made "in good faith reliance" on an ordinance later declared unconstitutional. Probable cause was not lacking simply because the officer did not anticipate that a court would hold the law unconstitutional. In a related context, this Court has said that "[t]he Constitution does not guarantee that only the guilty will be arrested." Baker v. McCollan, 443 U.S. 137, 145 (1979). Reasonable,

innocent mistakes, discovered after the fact, do not mean that probable cause was lacking:

> "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." Brinegar v. United States, 338 U.S. 160, 176 (1949).[6]

The result urged by the State here has already received tacit approval in Franks v. Delaware, 438 U.S. 154 (1978), where deliberate or reckless falsehoods were distinguished from negligent or innocent mistakes. Only materially false statements made by an affiant deliberately or with reckless disregard for

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6 In United States v. Matlock, 415 U.S. 164, 177 n.14 (1974), the Court expressly left open the question whether an officer's reasonable belief that a third party had sufficient authority to consent to a search would satisfy the Fourth Amendment even if that person lacked actual authority. The authors of one scholarly article have predicted that such searches will be upheld as a reasonable mistake of fact: W. Mertens and S. Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo.L.J. 365, 429 n.343 (December 1981).

the truth will render a warrant invalid. Id. The Constitution does not require perfection:

> "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a 'truthful showing' (emphasis in original). This does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." (quoting from United States v. Halsey, 257 F.Supp. 1002, 1005 (S.D. N.Y. 1966), aff'd, Docket No. 31369 (2d Cir. June 12, 1967).) 438 U.S. at 165.

Citizens supplying information upon which the police rely may also make mistakes. But, this Court has said:

> "We have never required that informants used by the police be infallible, and can see no reason to impose such a requirement in this case. Probable cause, particularly when police have obtained a warrant, simply does not require the perfection the dissent finds necessary." Illinois v. Gates, 462 U.S. 213, 245 n.14 (1983).

The wisdom in recognizing that police and informants are unfortunately fallible is illustrated by the number of cases involving mistaken identity or searches of the wrong premises. Issues arise both in terms of motions to suppress evidence in criminal trials and in damage suits for civil rights violations.

One example much like the instant case is United States v. Murrie, 534 F.2d 695 (6th Cir. 1976). The federal agents had a warrant to arrest Tommie Murrie. When they arrived at the house to arrest him, they discovered that the house was divided into two flats and officers went to both floors. Downstairs, they found Tommie Murrie, Jr., who identified himself as Tommie Murrie. He was arrested and a search of the couch where he was sitting revealed a pistol. As a previous felon, his possession of the firearm was illegal. Upstairs, the agents found Tommie Murrie, Sr., whom they later found out was the one named in the warrant. The Sixth Circuit found:

> "there was probable cause for the arrest of Tommie Murrie, Jr., since he identified himself by the name for which the arrest warrant had been issued, and the officer had no knowledge at the time that there were two

> Tommie Murries involved." 534 F.2d at 696-97.

The District of Columbia Court of Appeals upheld a warrantless search incident to arrest in United States v. Allen, 629 F.2d 51 (D.C. Cir. 1980), despite an officer's honest mistake regarding whether the particular establishment had a liquor license:

> "[A]n arrest based on factual assumptions later found erroneous may be valid if there is adequate factual basis in the record to determine the reasonableness of the officer's conduct in making the arrest."

The First Circuit found against a plaintiff who was mistakenly arrested in Gero v. Henault, 740 F.2d 78, 85 (1st Cir. 1984), cert. denied, Gero v. Pines, __ U.S. ___, 105 S.Ct. 965 (1985) stating that the "only question is whether it was reasonable for the arresting officers to believe that the person arrested was the one sought." See also, United States v. Glover, 725 F.2d 120 (D.C. Cir.), cert. denied, __ U.S. __, 104 S.Ct. 1682 (1984) (applying Hill and upholding arrest of Glover under arrest warrant for Mathis); United States v. McEachern, 675 F.2d 618, 621 (4th Cir. 1982) (arrest

of Jimmy McEachern under warrant for Ronnie McEachern valid, applying Hill.)

It is thus not novel to suggest that the constitutionality of police conduct turns on reasonable appearances rather than on absolute certainty or more accurate hindsight. The Fourth Amendment has never insisted on infallible precision and this Court has long recognized that police officers are, at times, fallible.

The rationale of the mistaken identity arrest cases applies with equal force to the search situation. The interference with a person's privacy occasioned by an erroneous search is, if anything, less compelling than the deprivation of liberty occasioned by an erroneous arrest. In both situations the promise of the particularity clause of the Fourth Amendment[7] has been thwarted - the wrong place has been searched or the wrong person or thing has been seized. Thus, proper resolution of the substantive Fourth Amendment issue here turns on the reasonableness of the

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[7] That clause "applies both to arrest and search warrants," Wong Sun v. United States, 371 U.S. 471, 481 n.9 (1963).

police belief that there was only one third floor apartment both when the warrant was issued and when it was executed.

Issuance of Warrant

The purpose of the particularlity requirement, of course, is to prevent general searches:

> "By limiting authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search is carefully tailored to the justification, and does not resemble the wide-ranging general searches that the Framers intended to prohibit." (footnote omitted) Leon, and Sheppard, ___ U.S. at ___, 82 L.Ed.2d 722, 725, 104 S.Ct. 3446, 3448 (Stevens, J. concurring and dissenting).

The description of the place to be searched is sufficiently particular if an officer can "with reasonable effort ascertain and identify the place intended." Steele v. United States, 267 U.S. 498, 503 (1925). The two goals are both to enable the officers who execute the warrant to know where they are permitted to search and what or whom they are permitted to seize, and to enable the citizen whose privacy, possessory rights or liberty is affected to

ascertain the limits of the authorization, Leon and Sheppard, 104 S.Ct. at 3449, 82 L.Ed.2d at 726 (Stevens, J.).

Both of those aspects of the particularity requirement were satisfied by the description in this case. A single warrant authorized the search of both Lawrence McWebb and the third floor apartment at 2036 Park Avenue. The affidavit stated clearly that McWebb was allegedly selling marijuana out of "his" apartment, the only one located on the third floor. The officer who sought the warrant took reasonable steps to determine the location and description of the apartment from which the marijuana was being sold. Based on the information from the informant, he consulted the Baltimore Gas and Electric Company for the name of the occupant. He was told then that there was only one third floor apartment, the one occupied by McWebb. There was no reason to question the validity of that information prior to or even during the search until the second kitchen was found. It follows that there was reasonable compliance with the particularity requirement of the Fourth Amendment.

In many cases, inaccuracies and mistakes make the description less than perfect or even foolproof. But the test for determining whether the description was sufficiently particular is simply whether the police reasonably undertook to describe the place they had probable cause to search, given the information at their disposal at the time. Illustrations and accommodation of the practical limitations in ascertaining precise descriptions of multiple occupancy structures are collected in Annot., Search Warrant: Sufficiency of Description of Apartment or Room to be Searched in Multiple-Occupancy Structure, 11 A.L.R.3d 1330 (1967, 1985 Supp.) and W. LaFave, 2 Search and Seizure, §4.5. For example, in United States v. Prout, 526 F.2d 380, rehearing and rehearing in banc denied, 529 F.2d 999 (5th Cir.), cert. denied, 429 U.S. 840 (1976), a warrant describing a real estate office was found to encompass the upstairs apartment as well, even though the apartment in reality had a different street address. The determining factor:

> "is not whether the description given is technically accurate in every detail but rather whether the description is sufficient to enable the executing

> officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched which is not the one intended to be searched under the search warrant.'" 526 F.2d at 387-88 (quoting United States v. Aklaroff, 323 F.Supp. 296, 321 (S.D. Fla. 1971).)

So, too, in People v. Thomas, 388 N.E.2d 941 (Ill.App. 1979), a warrant for the third floor apartment at a particular address sufficiently described the entire apartment despite the fact that three rooms were sublet to people other than the one from whom cocaine had been purchased.

Here a search of McWebb's third floor apartment was authorized by the warrant.[8] Had the existence of two apartments on the third floor been obvious when the officers reached the landing, neither they nor McWebb would have had any trouble in

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[8] Under Maryland procedure, copies of the application and affidavit are to be served on the person whose property is seized along with the warrant itself, even if the former are not formally incorporated in the warrant. Md.Rule 4-601(c). Thus, they are available at the time of the search to assist in identifying the proper object of the search.

ascertaining which apartment was properly subject to search. The separateness of the two apartments was not apparent, however, and the police proceeded to execute the warrant for the one third floor apartment they found. (The reasonableness of the execution of the warrant is a separate consideration and will be discussed, infra.) Under these circumstances, the warrant particularly described the place to be searched and was valid.

Execution of Warrant

Even a search under a valid warrant may become unconstitutional, however, if conducted in an unreasonable manner, such as one effected with excessive force, or one accompanied by gratuitous destruction of property, or one lasting an unnecessary length of time, Dalia v. United States, 441 U.S. 238, 258 (1979); Tarplay v. Greene, 684 F.2d 1, 8 (D.C. Cir. 1982); Duncan v. Barnes, 592 F.2d 1336, 1338 (5th Cir. 1979). Essentially, that type of conduct constitutes an unreasonable scope violation and can render execution of a valid warrant unconstitutional. In each instance, the police have improperly exceeded the authorization

of the warrant. So, too, when the police search a place not intended to be included, it must be determined whether they unreasonably exceeded the scope of the warrant. Proper execution of a search warrant means a search of "only those places and for those objects that it was reasonable to beiieve were covered by the warrant." Leon, __ U.S. at __, n.19, 104 S.Ct. at 3419 n.19, 82 L.Ed.2d at 695 n.19.

Here, the warrant authorized a search of the apartment on the third floor of 2036 Park Avenue. Respondent's apartment was on that floor and was thus arguably included within the warrant. Even if the warrant is read more narrowly to encompass only McWebb's half of the third floor, the search was constitutional because the police reasonably believed they were in McWebb's apartment.

The trial court unquestionably found that the police had no actual notice of the existence of the separate apartments until after the heroin was found. Given the physical appearance of the entry way, the arrival of McWebb and the entry gained with his key, the failure of either McWebb or Respondent to

question the search, the open access between both sides of the third floor, and the information from the informant and the utility company, the police reasonably believed that they were properly acting within the scope of the warrant. When they discovered the two kitchens - after seizing the heroin - they realized the mistake and ceased the search.

The same policies that insulate innocent factual mistakes in the warrant-issuing stage from constitutional challenge apply with equal force to the actual search. Belief that the police are acting properly within the scope of their authorization, if reasonably based on the facts and circumstances as they appeared at the time, is not unconstitutional.

Good Faith Exception to the Exclusionary Rule

Were this Court to find, however, that a constitutional violation occured simply because the description of the premises was sufficiently erroneous to allow a search of Respondent's apartment, then we urge the application of the good faith exception to the exclusionary rule. As put in LaFave, 2 Search and Seizure, §4.5 (1986 Cum.Supp.), "under Leon

suppression is required because of a particularity defect only if the warrant was 'so facially deficient - i.e. in failing to particularize the place to be searched or the things to be seized - that the executing officers cannot reasonably presume it to be valid.'" Accord, United States v. Savoca, 761 F.2d 292, 296 (6th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 153 (1985). The same reasons advanced by Petitioner above for finding no unconstitutional behavior at all would apply if the Court needs to address the applicability of the exclusionary rule and would dictate a finding that the police were objectively reasonable in believing that the warrant validly authorized their search.

Under ordinary circumstances, a check with a utility company can be expected to yield reliable information. Here, that information coupled with the total absence of any indication from the informant that there were two apartments reasonably led the police to conclude that there was only one third floor apartment, that occupied by McWebb.

Similarly, it was reasonable to assume that the premises to which they gained access by using

McWebb's key were, indeed, McWebb's apartment. People do not normally leave exterior doors open with clothes hanging on them, nor do they fail to protest when two apartments are searched under a warrant for one. The belatedly discovered indications of separate apartments (electric bills, unused deadbolt locks, numbers on door jambs) were not sufficiently obvious to alert the officers of their mistake. Rather, all appearances supported the conclusion in the warrant: McWebb's was the only third floor apartment at 2036 Park Avenue and the police were searching that apartment when they discovered and seized the heroin.

To apply the exclusionary rule under these circumstances would not further its deterrent purpose. Instead, it would signal to the police that they are to be held to an impossible standard - that of perfection for themselves and for those who supply them with information. Where, as here, the police make a reasonable investigation and rely in good faith on appearances, there is no misconduct to be deterred and no need to apply the exclusionary rule.

CONCLUSION

As the foregoing demonstrates, the Fourth Amendment requires only sufficient probability, not certainty. The reasonable mistake of fact that led the police in this case to obtain and execute a warrant for the third floor apartment at 2036 Park Avenue when Respondent and the target McWebb actually occupied separate apartments did not render the search unconstitutional. Proper evaluation of the conduct of the police in obtaining and executing the warrant reveals that they acted in an objectively reasonable manner. Respondent is not entitled to have the heroin suppressed and Petitioner requests that the judgment of the Court of Appeals of Maryland be reversed.

Respectfully submitted,

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May 1, 1986

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QUESTION PRESENTED

Does the Fourth Amendment require suppression of evidence seized during the warrantless search of Respondent's apartment?

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SUMMARY OF ARGUMENT

Baltimore City Police officers searched the premises of the Respondent without a warrant. The search of a fixed premise without a warrant, absent exigent circumstances, is *per se* unreasonable. No exigent circumstances existed that would trigger one of the recognized exceptions to the warrant requirement. The search was thus unconstitutional, and the fruits of the search must be suppressed.

ARGUMENT

The Fourth Amendment Requires Suppression Of Evidence Seized During The Warrantless Search Of Respondent's Apartment.

It is uncontested that the search of the Respondent's apartment was conducted without a search warrant. A search warrant had been issued to search the third floor apartment of Lawrence McWebb at 2036 Park Avenue, Baltimore, Maryland. The police expanded their search to include the apartment of the Respondent located on the same floor.

The warrant clause of the Fourth Amendment unequivocally requires that searches and seizures are to be made pursuant to a warrant and that all warrants be particular and supported by probable cause. "Searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment subject only to a few specifically delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967)

These few exceptions to the warrant requirement have been "jealously and carefully drawn" by this Court. *Jones* v. *United States*, 357 U.S. 493, 499 (1958). Before allowing the introduction of evidence seized without the prior

approval of a neutral and detached magistrate, this Court has demanded that there be a showing "by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *McDonald* v. *United States*, 335 U.S. 451, 456 (1948).

During the seventy-two years since the decision in *Weeks* v. *United States*, 232 U.S. 383 (1914), this Court has carefully defined the parameters of searches conducted outside the judicial process.

There are exceptional situations where exigent circumstances make a search without a warrant imperative. For example, the exigency created by the readily mobile character of automobiles permits a warrantless search of an automobile when there is probable cause to believe the vehicle contains contraband. *Carroll* v. *United States*, 267 U.S. 132 (1925).

Another exception to the warrant requirement, commonly referred to as the "emergency doctrine," exists in two distinct situations. One is where the police have a reasonable belief that evidence is being or is in imminent danger of being destroyed. *See, e.g., Ker* v. *California*, 374 U.S. 23 (1963). The second is where there is a danger to life and limb. *See, e.g., Michigan* v. *Tyler*, 436 U.S. 499 (1978) (firefighters permitted to enter building, without a warrant, to fight fire and were permitted to remain there for a reasonable period of time to investigate the case of the fire).

The "hot pursuit" doctrine is another exception to the warrant requirement which evolved from the emergency doctrine. In *Warden* v. *Hayden*, 387 U.S. 294 (1967), this Court approved the warrantless entry of a home to arrest the perpetrator of an armed robbery who was seen entering the house five minutes earlier. "The Fourth Amend-

ment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Id.*, at 298-299.

Police officers may also make a warrantless search of an individual who has been placed under arrest. Searches incident to an arrest are permitted because they have "always been recognized under English and American law . . . to discover and seize fruits or evidences of crime." *Weeks*, *supra*, at 392. Under certain circumstances, police officers may, without a warrant, seize evidence in "plain-view" when the discovery of the evidence is inadvertent and of incriminating value. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Finally, *Weeks*, *supra*, also recognized that an individual can give his consent to police officers to conduct a search without a warrant.

Attempts to expand the circumstances under which the exceptions can be applied have also been jealously guarded. This is especially true where the individual's sanctity in his home is threatened. Thus, the emergency doctrine has not been extended to allow the entry into a fire-damaged home five hours after the blaze has been extinguished and the homeowner has made reasonable efforts to secure his home. Such a "search must be conducted pursuant to a warrant, consent or the identification of some new exigency." *Michigan* v. *Clifford*, 464 U.S. 287, 297 (1984).

Searches incident to an arrest are limited to "a search of the person and the area into which an arrestee might reach in order to grab a weapon or evidentiary items." *Chimel* v. *California*, 395 U.S. 752 (1969). "If a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house." *Vale* v. *Louisiana*, 399 U.S. 30, 33-34 (1970).

A consent to search is scrutinized to be sure that, under the totality of the circumstances, it is voluntary. A consent is voluntary if it is not "the result of duress or coercion, express or implied." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248 (1973).

The touchstone of the Fourth Amendment is reasonableness. As discussed earlier, this Court, since *Weeks*, has "jealously and carefully" drawn those exceptions to the warrant requirement which are reasonable. These exceptions have been carefully delineated to strike a delicate balance between society's interest in combating crime and an individual's reasonable expectation of privacy. None of the exceptions discussed infringe upon the Fourth Amendment because the exigencies presented by each situation have supported the reasonableness of the warrantless searches.

The exigencies that must exist to allow the warrantless entry and search of a home are substantial because the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980), (citation omitted). "At the very core [of the Fourth Amendment] stands the right of a [person] to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). *Katz*, *supra*, reaffirms that warrantless searches are *per se* unreasonable except where the facts and circumstances surrounding a warrantless search fall within one of the recognized exceptions.

None of the recognized exceptions to the warrant requirement have been urged by the Petitioner to validate the warrantless entry and search of the Respondent's apartment. The search of the Respondent's apartment,

having been conducted without a warrant and without any exigency precipitating one of the recognized exceptions, was *per se* unreasonable and thus unconstitutional.

Petitioner is seeking a radical new exception to the warrant requirement which would condone warrantless searches whenever a police officer believes he has the right to conduct a warrantless search. Relying on language in *United States* v. *Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) and *Massachusetts* v. *Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), the Petitioner is asking this Court to carve a novel "good faith" exception to the warrant requirement. This reliance is misplaced.

Leon and *Sheppard*, by upholding searches conducted with the approval and direction of warrants signed by a detached and neutral magistrate, reaffirmed the Fourth Amendment's warrant requirement.

> Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches from the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'" *United States* v. *Chadwick*, 433 U.S. 1, 9, 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977) (quoting *Johnson* v. *United States*, 333 U.S. 10, 14, 92 L.Ed. 436, 68 S.Ct. 367 (1948), *we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." United States* v. *Ventresca*, 380 U.S. 102, 106, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965). See *Aguilar* v. *Texas*, 378 U.S., at 111, 12 L.Ed. 2d 723, 84 S.Ct. 1509.

Leon, supra, at 913-914. (emphasis added).

The search of the Respondent's apartment was an error of constitutional dimension. It was a search required by the Fourth Amendment to be conducted with a warrant. In *Leon* and *Sheppard* the police officers had warrants authorizing the searches they conducted. The officers having done what the Fourth Amendment required, it was reasonable for them to rely on the warrants they had obtained to conduct their searches.

In the instant case, the police officers had not obtained a warrant to search the Respondent's apartment. They had a warrant which particularly described the apartment of Lawrence McWebb as the premise to be searched. The warrant did not authorize the search of anyone else's apartment. Unlike the situations in *Leon* and *Sheppard*, the police officers in the instant case made the fatal mistake, not the issuing magistrate.

Petitioner has not shown that any exigency existed at the time of the warrantless entry into Respondent's apartment which would allow even the consideration of a "good faith" exception to the warrant requirement. *See*, *McDonald* v. *United States*, *supra*. No amount of probable cause will allow the warrantless entry into a fixed premise. *See*, *Agnello* v. *United States*, 269 U.S. 20 (1925); *Johnson* v. *United States*, 333 U.S. 10 (1948); *Katz* v. *United States*, *supra*. Similarily, no amount of reasonable mistake or good faith should allow the warrantless search of a fixed premise.

Petitioner also seeks to condone the warrantless search of the Respondent's apartment because of this Court's recognition of good faith conduct by police officers when they have mistakenly arrested the wrong individual, *e.g.*, *Hill* v. *California*, 401 U.S. 797 (1971), or when arresting an individual pursuant to a later invalidated ordinance,

e.g. Michigan v. *DiFillippo*, 443 U.S. 31 (1979). The arrests in *Hill* and *DiFillippo* were reasonable under the Fourth Amendment because there was adequate probable cause to affectuate the arrests. In the instant case, there was no probable cause to search the Respondent's apartment. Thus the search was unreasonable.

Petitioner's arguments ignore the decisions of this Court that place greater protection on a fixed premise than on the individual. Under the common law, a person who is suspected of having committed a felony can be arrested without a warrant. But that same suspect can not be arrested within a fixed premise (absent exigent circumstances, *e.g. Warden* v. *Hayden*, *supra*[1]), without a warrant regardless of the amount of probable cause. *See*, *Payton* v. *New York*, *supra*. This is because "the Fourth Amendment has drawn a firm line at the entrance to the house." *Id.*, at 590.

> The Fourth Amendment protects the individual's privacy in a variety of settings. *In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home*—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511.

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[1] In accord, *Welsh* v. *Wisconsin*, 466 U.S. 740, (1984), officer must consider the gravity of the offense when claiming hot pursuit; Court refused to extend doctrine to the warrantless entry into a home to arrest an individual for a civil traffic offense.

Id., at 589-590 (emphasis added).

An individual can be subjected to a limited warrantless intrusion of his person—a stop and frisk—for the purpose of ascertaining whether he is carrying or concealing a weapon when an officer has reasonable, articulable suspicions that the person is armed. *See, Terry* v. *Ohio*, 392 U.S. 1 (1968). A stop and frisk is a lesser form of a full scale seizure and search. This same type of limited intrusion into a person's home to search for weapons, fruits or instrumentalities of crime is not permitted.

The scope of the warrantless search of an automobile announced in *Carroll* v. *United States, supra*, has been expanded to allow a search "as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched.'" *Ross* v. *United States*, 456 U.S. 798, 800 (1982).

A person has a lesser expectation of privacy when he is walking outside amongst society or when he is driving his vehicle upon our nation's roads. His actions can be observed by anyone in his vicinity. But in his home, he has his greatest expectation of privacy—he is safe from unwarranted intrusion by the government.

Recently, the distinction between a person's greater protection in his home was implicitly reaffirmed in *California* v. *Carney*, ___ U.S. ___, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). In *Carney* Chief Justice Burger noted that a mobile home, while it may have many attributes of a home, still clearly falls within the scope of the automobile exception applied in *Carroll* and its progeny. Thus, in determining that a mobile home falls within the classification of a vehicle, a warrantless search is permissable. Implicitly, if the mobile home had been

found to be the equivalent of a fixed premise, a warrantless search would have been impermissable.

Finally, Petitioner is attempting to justify the warrantless search of the Respondent's apartment because of the police officers' good faith reliance on an imprecise description of the premises to be searched. Petitioner cites no cases in support of this theory. Instead, Petitioner has presented cases which have upheld searches conducted with a warrant which were under attack for failing to particularly describe the place to be searched, when evidence sought to be excluded came from the area directed to be searched by the search warrant.[2] None of these cases allow the scope of the search to extend beyond the area described in the warrant.

The Courts have refused to condone searches that have exceeded the scope of a warrant's authorization. *See*, *Keiningham* v. *United States*, 287 F.2d 126 (2nd Cir. 1960) (search warrant for home, described as 1106 Eighteenth Street, N.W. did not allow the search of neighboring property, 1108, even though a freshly cut door existed between the homes); *Flowers* v. *State*, 88 Okla. Crim. 252 (1949) (warrant authorizing search of a specific room in hotel cannot be used to search another separately occupied room).

The decision by the Court of Appeals of Maryland did not invalidate searches, pursuant to a warrant, of a subunit even though the police erroneously enter a premise not specified in the warrant before locating the premise specified in the warrant. The Court correctly invalidated

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[2] *See, Annot.*, Search Warrant: Sufficiency of Description of Apartment or Room to be searched in Multiple-Occupancy Structure, 11 A.L.R. 3d 1330 (1967, 1985 Supp.).

the seizure of items from premises not described in the warrant in accordance with the decisions of this Court. The warrant authorized the search of McWebb's apartment; it did not authorize the search of Respondent's apartment.

Police officers, when preparing to obtain a warrant to search a subunit within a multi-residence dwelling, must be required to ascertain with great certainty the proper location of the subunit. If required to do so the likelihood of unwarranted intrusions into the homes of others would be greatly diminished.

The changing character of residences in contemporary America requires no less. Today, millions of persons live in multi-unit dwellings. Many of these are built for multi-occupancy. Many more are older homes that, because of a changing socio-economic climate, have been converted into multi-residence dwellings. Persons living within older homes which have been converted into multi-unit dwellings have the same reasonable expectation of privacy guaranteed by the Fourth Amendment as do persons living in a single-family mansion. To protect persons living in a multi-unit dwelling from unwarranted intrusions, great care must be taken to ascertain the subunit sought to be searched. Only if the fruits of unwarranted searches from the homes of persons who are not the subject of authorized police investigations are suppressed, will the Fourth Amendment continue to protect society against unreasonable searches.

CONCLUSION

The Fourth Amendment protects our basic right to be free from unreasonable searches and seizures and further requires that all warrants be particular and supported by probable cause. The Court of Appeals of Maryland upheld the Fourth Amendment by ruling that the search of the Respondent's apartment was unreasonable because the warrant did not authorize the search of his apartment. The Petitioner seeks to have this Court ignore the Fourth Amendment's requirements by allowing searches of premises not authorized by a warrant. The Court of Appeals of Maryland refused to ignore the dictates of the Fourth Amendment as requested by the Petitioner. It upheld this Court's decisions that searches without a warrant are presumptively unreasonable. The Petitioner has not presented any sound justification for creating a new exception to the warrant requirement. Therefore, it is respectfully submitted that the decision of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

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FILED
OCT 29
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MARYLAND,

Petitioner,

v.

HAROLD GARRISON,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

THE POLICE ASSUMPTION THAT THERE WAS ONE APARTMENT ON THE THIRD FLOOR WAS REASONABLE. THUS, THERE WAS NO VIOLATION OF THE FOURTH AMENDMENT AND NO NEED TO APPLY THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE WHICH WOULD BE BASED ON AN IDENTICAL INQUIRY.

Respondent's argument, like the Court of Appeals opinion it seeks to defend, does not address the issue of reasonableness that is at the core of this case.

We do not seek "a radical new exception to the warrant requirement which would condone warrantless searches whenever a police officer believes he has the right to conduct a warrantless search." (Brief for Respondent at 5). Nor can this case be "readily resolved", as the Court of Appeals believed, merely by condemning the search of Garrison's apartment with the incantation that the police had no warrant to search it. (APC 36). The question is whether the police search of Garrison's bedroom in the mistaken

belief that it was part of McWebb's apartment was reasonable. Just as in Hill v. California, 401 U.S. 797 (1971), the heart of the matter is not whether the police acted mistakenly, but whether they acted reasonably. Reasonableness is what this case is all about.

Police, armed with a warrant to search both Lawrence McWebb and the premises "2036 Park Avenue, third floor apartment", entered the only door on the third floor at that address and commenced to search the premises. In fact, the third floor of 2036 Park Avenue accommodated two apartments, McWebb's and Respondent Garrison's. The trial court found that the police did not realize that the third floor contained two apartments until after the search was nearly over and they had recovered the incriminating evidence from Garrison's bedroom.

In order to analyze whether it was reasonable for the police to assume that the third floor contained only one apartment, it is helpful to consider their

conduct in three stages, each of which presented them with additional information, impressions and opportunities for judgment: (a) the period of investigation during which the warrant was sought and obtained; (b) the arrival at 2036 Park Avenue and the ascent to the third floor; and (c) the entry and search itself.

a. Investigation

Detective Marcus, an experienced narcotics detective, received information from a reliable, confidential informant that a person named "Red Cross" was selling marijuana "out of his apartment located at 2036 Park Avenue, third floor". (J.A. 6). According to the informant, he/she made frequent purchases from "Red Cross" over a period of six months, including a buy within hours of Marcus' execution of his affidavit for a search warrant. In each of the transactions the informant "rang the front bell", which was answered by "Red Cross" who invited the informant "up into his third floor apartment" (J.A. 6). The informant described 2036 Park Avenue as a

three story brick dwelling. He/she said nothing to indicate that there was more than one apartment on the third floor.

After personally corroborating the informant's description of the outside of 2036 Park Avenue, Marcus called the local utility, Baltimore Gas and Electric Company (B.G.& E.), "to find out who the third floor was listed to ...." (J.A. 37) and "discovered that the premises of 2036 Park Avenue, third floor, was in the name of Lawrence McWebb" (J.A. 7). Marcus testified as follows:

> "A. ... When I called the gas and electric and I ascertained an apartment, I asked if there is a front or rear or middle room. They told me, one third floor was only listed to Lawrence McWebb." (J.A. 36)

> "A. ... When I asked for the third floor apartment, I said, is anybody listed in either front or rear? They tell you if it is listed because they have it broken down that way." (J.A. 38)

A check of police records produced McWebb's arrest record and a photograph of McWebb, which was identified by the informant as "Red Cross". Marcus

prepared his affidavit and successfully sought the warrant.

We know now that the information received from B.G.& E. was mistaken and that there were two apartments on the third floor for which McWebb and Garrison were billed separately. But B.G.& E.'s mistake was not Marcus', nor is its negligence attributable to him. Marcus acted reasonably. He went to the one source most likely to know best how many apartments there were. He expressly asked if the floor was subdivided and he relied on B.G.& E.'s response.

It is true that Marcus could have done more. He could have checked with the building manager or owner. To do so, however, would have increased the likelihood that, intentionally or not, McWebb might have been alerted and evidence destroyed. He could have attempted to arrange a controlled buy or closer surveillance, but, as Marcus' affidavit points out, the location of the apartment on the third floor made

monitoring without detection nearly impossible (J.A. 7). He could have checked with the fire department or the phone company, but he had no reason to question information he had already received from a public utility. He could have questioned his informant more closely, but, in view of the B.G.& E. response, he had no need to inquire further.[1]

Marcus could have done all these things. But he simply had no reason to doubt the information he had received or to question the assumption on which he was acting. To insist that he should have done more distorts the Fourth Amendment's rule of reason.

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[1] Police routinely rely on information supplied by utilities, government agencies, and other institutional sources, e.g., United States v. Napoli, 530 F.2d 1198, 1200 (5th Cir. 1976), cert. denied, 429 U.S. 920 (1976) (telephone and city directories); Ballew v. United States, 389 F.Supp. 47, 57 (D. Md. 1975) (Maryland Motor Vehicle Administration). Unfortunately, these normally reliable sources can make mistakes, People v. Superior Court, County of Mono, 161 Cal.Rptr. 540, 551 (Cal.App. 1980) (misinformation by telephone company).

Police reliance on what the Court of Special Appeals called B.G.& E.'s "verification" was a crucial element in the trial court's finding that the search was reasonable and in the Court of Special Appeals' conclusions that the police "reasonably concluded that McWebb occupied the entire third floor" and "had no reason to believe that the third floor contained more than one apartment" (APC 13, 18).

b. Arrival

Events during the few minutes between arrival of the raiding party at 2036 Park Avenue and the search reinforced police assumptions that McWebb resided in the only apartment on the third floor.

Officer Shea, the first officer on the scene, attempted to gain access to the building without breaking down the front door. He wore a construction worker's hard hat as a ruse and rang all seven bells but got no response. Nothing in his observation of the bells or the mail slots warned Shea that the warrant was inaccurate. He saw no apartment numbers on the

mail slots or bells. He saw names but "definitely" (M2. 9) not the name McWebb. The fact that a three story building with a basement appeared to contain seven apartments did not contradict the information on which the warrant was based. As the Court of Special Appeals said, "any combination of units is possible". It called the idea that the number of apartments put police on notice that there were two apartments on the third floor "pure speculation" (APC 18).

Even assuming, however, that some basis may have existed for speculation or conjecture on Shea's part, it dissipated with the sudden arrival of McWebb. McWebb pulled up in a car moments after the police arrived and was immediately informed of the warrant and detained.[2] He furnished the key that opened the outside door and, after the raiding party of six or seven arrived on the third floor, the key to the door at

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[2] McWebb was legitimately detained because the warrant authorized a search of his person and under the rationale of Michigan v. Summers, 452 U.S. 692 (1981).

the top of the stairs. (M. 17) With McWebb now on the scene, there was no reason whatsoever to scrutinize doorbells, search out the resident manager or count apartments on each floor as the police climbed the stairs. The police had the most solid and reliable information available - the target of the investigation and anticipated search was going to let them into his apartment.

Nor did anything about the ascent itself cast doubt on the police premise that McWebb's apartment, and only McWebb's apartment, was at the top of the stairs. On the contrary, Detective Marcus noticed that there was only one door on the third floor but there were "a lot of doors" (M2. 61-62) on the other floors. Officer Shea also underscored the significance of the single third floor door:

> "Q: [on cross-examination] ... Did it occur to you that there may have been two apartments on the third floor?
>
> A: No. When I saw that one door, no, sir." (M2. 17)

The police had every reason to believe that McWebb was admitting them to the only apartment on the third floor, his own. They had no basis whatever to believe that he was admitting them to someone else's apartment. Under these circumstances it was not only reasonable to believe that the warrant's assumption of a single apartment was correct; it would have been quite unreasonable to believe otherwise.

c. Entry and Search

The few seconds following the officers' entry of the premises are especially critical in assessing the reasonableness of their conduct. They are crucial because Officer Marcus began searching Garrison's bedroom only moments after the entry. If the scene they came upon when they entered should have given them reason to believe that there were two apartments on the floor, then they should have reassessed their conduct regardless of either its reasonableness to that point or the presence of marijuana in plain view

on Garrison's dresser. Analytically, these few seconds are the consititutional point of no return.

But everything the police saw and heard in those first few moments strengthened their belief that they were in McWebb's apartment.

The front door admitted them to a tiny 4-5 feet wide foyer that opened onto a living room on the left and a bedroom on the right. The doors of those rooms opened inward and were fully open at the time. (J.A. 19-21, M2. 19) No closed doors, much less locked ones, were visible, as might have been expected if two apartments were involved. As the trial court found, "no door was visible at the time the police entered" (J.A. 43). Nothing about wide open access between a bedroom and a living room should have alerted the police to the sort of duplicate living arrangements they were to discover later.

Directly in front of the police as they packed into the foyer stood Garrison, bedroom on his left, living room on his right, not a closed door in sight.[3]

Nothing about Garrison's presence or demeanor suggested that he was a neighbor rather than a housemate of McWebb's. When asked who he was he gave his name and followed police instructions to step into the living room (M2. 165). Neither he nor McWebb indicated there were two apartments.[4] Garrison was dressed only in pajamas and a very cumbersome body cast that he wore because of recent spinal surgery (M2. 104). For all the police knew or had reason to believe as they moved to "secure" the apartment (M2.

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[3] Detective Marcus recorded on the warrant return that the front door was opened by Garrison (J.A. 10)

[4] The trial court so found as a fact despite conflicting testimony. (J.A. 44) We do not argue that subjects of a search have an obligation to speak on pain that their silence will be construed against their interest. But we suggest that the reasonableness of police conduct here cannot properly be assessed without considering the absence of any protest whatever from McWebb and Garrison, the only two present who knew what the police did not. Their silence is part of the story.

24, 74, 87), Garrison was simply someone who shared McWebb's apartment or perhaps a friend who was staying there during his convalescence.

The visible presence of marijuana on Garrison's dresser, while no justification in and of itself for entry into Garrison's bedroom, nonetheless further enhances the reasonableness of their conduct. The informant, after all, had told of buying marijuana in McWebb's third floor apartment. That is where the police believed they were. And they saw the marijuana about five and a half feet away. (M2. 46)

Perhaps a pause for further reflection as they entered the front door would have led them to proceed with extra caution. But police executing a search warrant for narcotics, while required to adhere strictly to legal and constitutional obligations, are not expected to be hesitant. As this Court has said "[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden

violence or frantic efforts to conceal or destroy evidence." Michigan v. Summers, 452 U.S. at 702.[5]

Petitioner concedes that, as the trial court found, the warrant "specified the premises to be searched as the third floor apartment of the defendant McWebb". We concede also that the police mistakenly searched Garrison's apartment as well. We do not say that the search of Garrison's apartment was justified just because the two men treated the two apartments as one, but we do say that their living arrangement confirmed the reasonable presupposition of the police that there was only one apartment. We respectfully suggest that the trial court was correct in concluding,

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[5] There were other indications that McWebb and Garrison were sharing one apartment. A phone call for "Red Cross", McWebb's street name, was received on the phone in Garrison's bedroom, although the testimony does not make clear at what point during the search the call arrived. Clothes were hung on a hanger on the outside of the door to Garrison's apartment, something one would not normally expect to find on the outside of an apartment's exterior door. Those clothes also initially obscured from view an unused deadbolt on the door. Its later discovery was one of the factors that led the police to stop the search (J.A. 32).

as the Court of Special Appeals put it, that "... the police could not reasonably have discovered, prior to the time that the search was conducted and the contraband was observed and seized, that the third floor contained two separate apartments...." (APC 26).

The mistakes made by the officers in this case were those of "reasonable men, acting on facts leading sensibly to their conclusions of probability." Brinegar v. United States, 338 U.S. 160, 176 (1949). Here, as in Hill, the officers' mistake was understandable because "sufficient probability, not certainty is the touchstone of reasonableness under the Fourth Amendment". 401 U.S. at 804. As Maryland's Court of Special Appeals put it, "one may require the police to be observant and to act reasonably; clairvoyance, however, is not required." (APC 18)

"Good Faith"

We do not argue, as Respondent suggests we do, that this case calls for an expansion of the good faith

exception to the exclusionary rule announced by this Court in United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and Massachusetts v. Sheppard, ___ U.S. ___, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). On the contrary, we believe that since there is no Fourth Amendment violation, there is no reason to apply the exclusionary rule or to invoke the good faith exception to it.

The good faith exception to the exclusionary rule assumes a violation of the Fourth Amendment, but excuses it because the police officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. The rule had its genesis in cases in which police officers, in "good faith", drew erroneous conclusions as to the existence of probable cause or relied on a warrant issued by a judicial officer without legal justification or that was deficient in some necessary but "technical" particulars, Leon; Sheppard; United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980), cert. denied, 449 U.S.

1127 (1981). It has operated most clearly in cases where a "mistake of law" that constitutes a Fourth Amendment violation is pardonable because of the officer's objectively reasonable "good faith". In such circumstances, two separate inquiries, one to determine if there was a Fourth Amendment violation and the other to determine whether it was excusable, are necessary. See, e.g., State v. Brown, 708 S.W.2d 140, 145 (Mo. banc 1986) (assumption that warrant issued without verified application in proper form); State v. Sweeney, 701 S.W.2d 420 (Mo. banc 1985) (anticipatory search warrant, assumed to be invalid under Missouri law); State v. Wilmoth, 490 N.E.2d 1236, 1244 (Ohio 1986) (error in wording of oath); United States v. Hendricks, 743 F.2d 653 (9th Cir. 1984) (prospective search warrant); McCary v. Commonwealth, 321 S.E.2d 637 (Va. 1984) (error in written affidavit, corrected orally under oath before magistrate, search valid under Leon even if warrant somehow invalid); United States v. Asselin, 775 F.2d

445 (1st Cir. 1985) (search of disabled car undertaken in good faith belief that it was included within "premises" to be searched under warrant).

But where, as here, the police mistake is purely factual, the issues of whether there was a Fourth Amendment violation and whether the police acted in good faith are one and the same. The two questions merge. The objective reasonableness of the factual perception of the police is at the core of both inquiries.

Traditional Fourth Amendment probable cause standards already allow for reasonable, albeit mistaken, factual determinations. To state the classic definition from Carroll v. United States, 267 U.S. 132, 162 (1925), probable cause exists if "the facts and circumstances within [the officers'] knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that [evidence of crime will be found in the place to be searched.]"

Professor LaFave points out "that in situations when an officer, acting upon a correct perception of the governing legal principles, makes a mistaken judgment as to the relevant facts ... there is no need to tamper with the exclusionary rule ...." W. LaFave, 1 Search and Seizure, §1.2 (1978, 1986 Supp. at 8). As Chief Justice Erickson of the Colorado Supreme Court recently said, "[A] 'reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause' . . . simply restates the existing standard for probable cause." People v. Deitchman, 695 P.2d 1146, 1150 n.6 (Colo. 1985) (concurring op.).

Indeed, every time a court stresses that the validity of a search or seizure turns on "reasonable appearances" facing the police at the time of the questioned conduct, it is acknowledging that the facts may turn out to be otherwise. See, e.g. cases cited in W. LaFave, 1 Search and Seizure, §1.2 (1978, 1986 Supp. at 8 and 38 n.71.27 and 71.28), especially United

States v. Rubin, 474 F.2d 262 (3d Cir. 1973), cert. denied, 414 U.S. 833 (1973) (emergency, reasonable belief that contraband will be destroyed or removed before warrant secured); People v. Mitchell, 347 N.E.2d 607 (N.Y. 1976), cert. denied, 426 U.S. 953 (1976) (emergency search for missing person); People v. Henderson, 210 N.E.2d 483 (Ill. 1965) (reasonable conclusion that defendant consented to search); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 424 U.S. 925 (1976) (authority of mother to consent to search of son's room). Other examples are the mistaken conclusion that the defendant was driving a stolen car, State v. Conaway, 319 N.W.2d 35, 41 (Minn. 1982) (probable cause for defendant's arrest existed despite car dealer's mistake in reporting license number to police and failure of police record to reflect recovery of stolen car); the mistaken search for a shooting victim who was already on the way to the hospital in People v. Soldoff, 169 Cal.Rptr. 57 (Cal.App. 1980) (officer conducting warrantless search

did not receive information that victim was already on route to hospital until after search revealed evidence); and the warrant to search for a weapon in the hands of an ex-felon in United States v. Hole, 564 F.2d 298 (9th Cir. 1977) (affiant reasonably relied on incomplete and misleading information from California Department of Justice regarding Hole's prior criminal record).

The notion of objectively reasonable police good faith has traditionally helped to resolve these cases of factual misperception. The clearest example is, of course, Hill v. California, 401 U.S. at 803-04, where the Court said:

> "[T]he officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." (Emphasis added).

While this Court correctly observed in Leon that, "As yet, we have not recognized any form of good faith exception to the Fourth Amendment exclusionary rule," __ U.S. at __, 104 S.Ct. at 3416, 82 L.Ed.2d at 692, it had more than a decade earlier adopted, in effect, an objectively reasonable good faith test by which to measure police mistake of fact in Fourth Amendment cases. In factual misperception cases, this Court recognized "good faith" as a useful tool of analysis long before it acquired the dignity of doctrine. We suggest that cases such as this fall squarely within the category contemplated by this Court when it said in Leon: "Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue." __ U.S. at __, 104 S.Ct. at 3423, 82 L.Ed.2d at 700.

We urge the Court to decide this case on Fourth Amendment grounds and to say that in cases such as this the merits of the Fourth Amendment claim and

the good faith inquiry are the same. As we argued in our original brief (Brief for Petitioner at 13-16), it is important to identify constitutional parameters in order to give the police clear guidance on permissible behavior and to assure that damage actions are properly resolved. It is also important because many states may not adopt good faith exceptions to their own exclusionary rules,[6] but may well continue to follow this Court in defining constitutional violations under their own parallel constitutional provisions. For those states in particular, it will be essential to know that the type of mistake here is constitutionally allowable.

Of course, if the Court should perceive a distinction in mistake of fact cases between the issue of Fourth Amendment compliance and the good faith inquiry and hold here that the mistake made the search

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[6] E.g., People v. Bigelow, 488 N.E.2d 451 (N.Y. 1985); State v. Novembrino, 491 A.2d 37 (N.J. Super. 1985), cert. granted, 101 N.J. 305, 501 A.2d 962 (1985).

unconstitutional, we naturally urge the Court to conclude that the police acted with the objectively reasonable good faith sanctioned in Leon and Sheppard. But, as we have tried to argue, we believe the two inquiries are the same.

CONCLUSION

For the reasons advanced herein, as well as those stated in our original brief, Petitioner requests that the judgment of the Court of Appeals of Maryland be reversed.

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October 29, 1986

No. 85-759

(3)

Supreme Court, U.S.
FILED
APR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MARYLAND,

Petitioner,

v.

HAROLD GARRISON,

Respondent.

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE LEGAL FOUNDATION OF AMERICA, AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., IN SUPPORT OF THE PETITIONER

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Deborah K. Chasanow, Assistant Maryland Attorney General, Chief, Crimi-

nal Appeals, Counsel for Petitioner, and Gerald A. Kroop, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Legal Foundation of America (LFA), is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

Amici are professional associations representing the interests of law enforcement agencies at the state and local level. Our members include (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of obtaining and executing arrest and search warrants; and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such warrants, and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of rulings such as that of the court below, *Garrison v. State*, 303 Md. 385, 494 A.2d 193 (1985), and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

ARGUMENT

I.

THE FOURTH AMENDMENT EXCLUSIONARY RULE DOES NOT REQUIRE SUPPRESSION OF EVIDENCE SEIZED FROM DEFENDANT'S SEPARATELY LEASED THIRD FLOOR APARTMENT, DURING EXECUTION OF A VALID SEARCH WARRANT FOR ANOTHER PERSON'S APARTMENT LOCATED ON THE SAME FLOOR OF THE APARTMENT BUILDING, WHEN THE POLICE, IN APPLYING FOR AND EXECUTING THE WARRANT, REASONABLY BELIEVED THAT THERE WAS ONLY ONE THIRD FLOOR APARTMENT.

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the *National District Attorneys Association,* the *International Association of Chiefs of Police,* various other associations of chiefs of police and sheriffs, and the *Legal Foundation of America.* Those briefs have often presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, and without impinging upon basic constitutional protections. In the present brief, we will not undertake an extended analysis of the case law, but will confine our brief to the law enforcement impact of the issues raised by this case.

This case is typical of a factual scenario frequently encountered by police officers in large urban areas. An officer of the Baltimore City Police Department applied for a warrant to search the dwelling of one Lawrence Meril McWebb. The officer stated in the affidavit that he had met with a "proven Confidential Reliable Informant" who told him that McWebb was selling marijuana out of his third floor apartment at 2036 Park Avenue, in Baltimore, Maryland. The officer further stated in the affidavit in application for the search warrant that he verified McWebb's address:

> Upon receiving the above information from the proven confidential reliable informant your Affiant Detective Marcus went to the premises known as 2036 Park Avenue and found it exactly as the Informant had described as a three story brick dwelling with the numerials [sic] 2-0-3-6 affixed to the front of the premises. Further your Affiant made a check with the Baltimore Gas and Electric Company and discovered that the premises of 2036 Park Avenue third floor was in the name of Lawrence McWebb. Your Affiant Marcus then checked with the Baltimore Police Department and discovered that there was a subject by the name of Lawrence Merial [sic] McWebb, black male date of birth 12/20/31 with an address of 2036 Park Avenue third floor who had been arrested in the past with a B. of I. number of 108-147. According to arrest records the subject McWebb is described as being a black male 5'11" tall weighing 150 pounds. This was exactly as described by Informant.

Affidavit for search warrant as quoted at 494 A.2d at 193-194.

When the officer applied for the search warrant, he believed in objective good faith that only one apartment occupied the entire third floor of the apartment building. The warrant that was issued by the magistrate authorized a search for marijuana and related materials "on the person" and "on the premises" of "Lawrence Meril McWebb," at "2036 Park Avenue third floor apartment described as being a three story brick dwelling with the numerals 2-0-3-6 affixed to the front of same."

Armed with this search warrant, several Baltimore police officers, including the officer who was the affiant and applicant, searched the entire third floor of 2036 Park Avenue, believing in objective good faith that they were searching the apartment of the person named in the affidavit and warrant. As a result of the search, the officers seized evidence from two separate but indistinguishable (to them) apartments on the third floor, McWebb's and the defendant's. The Court below suppressed the evidence seized from the defendant's apartment, ruling that

the police had no justification under the Fourth Amendment to search defendant's apartment, "regardless of appearances," 494 A.2d at 197, which to the officers made the separate apartments indistinguishable, and additionally refused to apply a good faith exception to the actions of the police officers, 494 A.2d at 197-198.

Counsel for *amici,* in their close association with the police, as noted above (and the former service of some of them as police legal advisors), know the great lengths to which narcotics dealers frequently go to confuse and confound the police in searching for evidence. For example, apartment door numbers are often altered, removed, and even replaced with other doors. It is not uncommon to find more than one apartment with the same number. This is done deliberately by narcotics dealers so that the police will not know which apartment is the correct one according to their arrest or search warrant.

Narcotics dealers and their legal counsel know that they have a better chance of attacking a warrant under the particularity requirement of the Fourth Amendment if the evidence shows there were two or more "Apartment No. 3" doors in their building. If the police go to the right apartment, the occupant's attorney will assert that the description by apartment number was not sufficient because more than one apartment bore that number, or his unit bore no number. Similarly, if police in good faith erroneously enter the wrong apartment (or a portion thereof), that entry will also be attacked as illegal and the evidence declared unlawfully seized.

The present case is similar to *Hill v. California,* 401 U.S. 797, 91 S.Ct. 1106 (1971). In *Hill,* the police had probable cause to arrest a robbery suspect and mistakenly arrested another person in the suspect's apartment. A search of that person, incident to his arrest, revealed criminal evidence. The Court upheld that search as reasonable and valid under the Fourth Amendment. The Court stated:

> . . . [the] police were entitled to do what the law would have allowed them to do if Miller had in fact been Hill, that is, to search incident to arrest and to seize evidence of the crime the police had probable cause to believe Hill had committed. [Their conduct was appropriate when] judged in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act."

401 U.S. at 804-5, 91 S.Ct. at 1111 (quoting from *Brinegar v. United States,* 338 U.S. 160, 175, 69 S.Ct. 1302, 1310 (1949)).

Amici are well aware that the "factual and practical considerations of everyday life" of narcotics dealers differ from those surrounding the lives of the law-abiding community. Residents of suburban Chevy Chase or Arlington, Virginia, do not ordinarily attempt to confuse visitors and delivery personnel by removing, defacing, altering or switching apartment numbers or doors. Yet such evasive and obfuscating conduct is a frequent tool in the *modus operandi* of narcotics peddlers, if not to escape detection, then to later challenge the legal sufficiency of the search warrant affidavit.

Although this case does not involve a switching of doors or apartment numbers, the confusion nevertheless resulted from their apparent absence. The officers could not tell, as they entered to search, that there were two separate apartments on the third floor of the apartment building. **Should the law confer special protections for those who fail to number their door or deceive police with false, duplicate or altered numbers?**

Amici respectfully submit that this Court should also be mindful of the behavioral differences between drug *abusers* and drug *dealers.* An *abuser* may be a resident of a respectable neighborhood, whereas a *dealer* frequently operates from a large home in a blighted urban neighborhood. Frequently such

places have been converted into many different units, and rearranged without design but rather for the convenience of the persons dwelling therein. Conscientious police officers can lawfully obtain the floor plans of newly constructed apartment buildings, but they cannot hope to find such plans in a municipal building department in the case of partitioned homes that, too often, have been divided by caprice, and without approval of building inspectors or zoning officials. *Amici* know from our experience and the experience of our members, that the latter are often the business places of inner-city drug peddlers.

The decision below is an invitation to such drug dealers to further misnumber, renumber or unnumber their places of business. This Court should not compound the confusion by conferring a sanctuary status on such premises. Rather, we urge the Court to apply the standard announced in *Hill v. California, supra.* The officers in *Hill* mistakenly and in good faith searched Miller, believing him to be Hill. In the present case, the police officers mistakenly and in good faith searched one part of the third floor, thinking that it belonged to the target of their investigation. Police officers, police legal advisors, and prosecutors will be hard-pressed to distinguish between those mistakes, and why one is excusable and the other is not.

Amici further submit that the evidence obtained by the police officers in this case is admissible under the good faith exception to the exclusionary rule adopted by this Court in *Massachusetts v. Sheppard,* 468 U.S. ____, 104 S.Ct. 3424 (1984). Other courts have recognized a good faith or innocent mistake exception to the particularity requirement, especially when officers were unaware of multiple occupancy of the premises. The leading case, *United States v. Santore,* 290 F.2d 51 (2nd Cir. 1960) noted that:

> The agents were not warned of a possible dual occupancy of the house until after they had shown a copy of the warrant to Orlando and had entered inside. At that

> moment, it was too late for them, consistent with the success of their mission, to have retreated and obtained a new warrant.

290 F.2d at 67.

The *Santore* principle has been followed and applied by many state courts (see LaFave, 2 Search and Seizure 79, § 4.5, fn. 37; Annotation, *Search Warrant: Sufficiency of Description of Apartment or Room to be Searched in Multiple-Occupancy Structure,* 11 A.L.R.3d 1330) and the Eighth Circuit in *United States v. Davis,* 557 F.2d 1239 at 1247-50 (8th Cir. 1977). See also, *Houser v. Geary,* 465 F.2d 193 (9th Cir. 1972); *United States v. Jordan,* 349 F.2d 107 (6th Cir. 1965); *Owens v. Scafati,* 273 F.Supp. 428 (D. Mass. 1967).

CONCLUSION

Amici respectfully request this Court to recognize the realities of narcotics law enforcement and their impact upon search warrants obtained and executed under the Fourth Amendment in good faith. We urge that the decision of the court below should be reversed on the basis of law and sound judicial policy.

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No. 85-759

(4)

Supreme Court, U.S.
FILED
APR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

THE STATE OF MARYLAND,

Petitioner,

v.

HAROLD GARRISON

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

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QUESTION PRESENTED

Does a police officer's reasonable mistake of fact in identifying the premises to be searched constitute "unreasonable" conduct within the meaning of the Fourth Amendment, thereby invoking the exclusionary rule?

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INTEREST OF THE PEOPLE OF THE STATE OF CALIFORNIA

This case exemplifies the recurrent application of the exclusionary rule to sanction mistakes of fact which, because made by policemen acting reasonably,

cannot be deterred and may not fairly be characterized as "unreasonable" conduct within the meaning of the Fourth Amendment.

The People of California, like the citizens of Maryland, have a compelling interest in protecting the reliability of verdicts in their criminal prosecutions from such applications of the suppression doctrine. That interest brings the People of the State of California before this Honorable Court as amicus curiae in support of petitioner.

SUMMARY OF ARGUMENT

Amicus doubts that this is an exclusionary rule case. Hill v. California, 401 U.S. 797 (1971) teaches that a police officer's reasonable misidentification of a person lawfully subject to arrest does not result in an "unreasonable" seizure within the meaning of the Fourth Amendment. Although Hill considered a

warrantless arrest, the police would have been in no worse position for having obtained a warrant. An officer's reasonable mistake as to the identity of the person named in his arrest warrant is not constitutionally different from an officer's reasonable mistake as to the identity of the premises described in his search warrant. The underlying principle is that an officer's reasonable mistake of fact is not "unreasonable" police conduct under the Fourth Amendment. Unfortunately, the state appellate court was indifferent to the reasonableness of the mistake of fact made by Baltimore police in securing and executing a search warrant for the premises of respondent Garrison.

Assuming this is an exclusionary rule case, however, the state high court's failure to consider the reasonableness of the officers' actions again

flaws its decision. The deterrent effect of the exclusionary rule is weakest where the illegality sanctioned results from a reasonable misapprehension of relevant facts. A decision suppressing evidence may tell the police what law they must follow henceforth, but such a decision cannot alter their future perception of physical facts. Michigan v. Tucker, 417 U.S. 433, 447 (1974), broadly recognized this inherent limitation of the suppression doctrine. United States v. Calandra, 414 U.S. 333, 348 (1974), restricted the application of the exclusionary rule "to those areas where its remedial objectives are thought most efficaciously served." These limitations did not enter into the decision to suppress evidence made below. Because it failed to consider [illegible] the substantive and remedial implications of the reasonableness of the Baltimore officers' good

faith mistake of fact, the judgment of the Court of Appeals of Maryland must be reversed.

ARGUMENT

A POLICE OFFICER'S REASONABLE MISTAKE OF FACT IN IDENTIFYING PREMISES TO BE SEARCHED IS NOT, WITHIN THE MEANING OF THE FOURTH AMENDMENT, "UNREASONABLE" CONDUCT INVOKING THE EXCLUSIONARY RULE.

Two decisions of this Court lead by different paths to a single conclusion: the Court of Appeals of Maryland erred in suppressing evidence seized from Harold Garrison's apartment. Those decisions, not cited in the state court opinion, are Hill v. California, 401 U.S. 797 (1971) and Michigan v. Tucker, 417 U.S. 433 (1974).

A. An Officer's Reasonable Mistake Of Fact Is Not "Unreasonable" Conduct Under The Fourth Amendment.

Hill v. California excused a police officer's reasonable mistake of fact.

Having probable cause to believe Hill had committed armed robbery, the police went to his apartment without a warrant. Miller, "who fit the description of Hill received from various sources," answered the door. 401 U.S. 799, 803. The officers, discrediting Miller's personal identification, his explanation for his presence in Hill's apartment, and his professed ignorance of a pistol and ammunition clip in plain view arrested Miller believing he was Hill.

> "They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake

> was understandable and the arrest a reasonable response to the situation facing them at the time." 401 U.S. at 804.

Consequently, although Miller was later released, evidence discovered during a search of Hill's apartment incident to Miller's arrest was held admissible against Hill.

Hill did not reach this conclusion by reasoning either that the police had "probable cause" to arrest Miller, or that exclusion of evidence cannot deter reasonable mistakes of fact. Accordingly, Hill teaches that an officer's reasonable mistake of fact in identifying a person lawfully subject to arrest is not an "unreasonable" seizure within the meaning of the Fourth Amendment.

Indisputably, Hill would have reached the same result had the police possessed an arrest warrant when they went to Hill's apartment. An officer's reasonable mistake as to the identity of the person named in his arrest warrant is not constitutionally different from an officer's reasonable mistake as to the identity of the premises described in his search warrant.

When the police arrest the wrong person or search the wrong place, it makes little difference whether their mistake occurred before or after the magistrate signed the warrant. The dispositive question is whether the mistake was a reasonable one.

In this case, the Baltimore police may have erred in securing and in executing their search warrant. Unfortunately, the state appellate court was indifferent

to the reasonableness of the officers' conduct.

The affidavit of Detective Marcus avers that "your Affiant made a check with the Baltimore Gas and Electric Company and discovered that the premises of 2036 Park Avenue third floor was in the name of Lawrence McWebb." Garrison v. State 494 A.2d 193 (Md. 1985). People v. Superior Court (Fish) 101 Cal.App.3d 218, 225, 161 Cal.Rptr. 547, 551 (1980), held that a misdescription of a lot number on a search warrant originating in misinformation furnished police by the telephone company was not the product of culpable official conduct. Amicus submits that Detective Marcus did not act unreasonably in relying on the information supplied by a public utility. Of course, a finding that his reliance was negligent would call into question the application of

Franks v. Delaware, 428 U.S. 154 (1978), permitting innocent and negligent affidavit misrepresentations to contribute to probable cause supporting a warrant.

As respects the execution of the warrant authorizing a search "'on the premises' of 'Lawrence Meril McWebb,' at '2036 Park Avenue third floor apartment,'" Garrison v. State, 494 A.2d at 194, the trial court found "the officers did not know that there was more than one apartment on the third floor and nothing alerted them of such a fact until after the search had been made. . . ." Id. at 195.

On these facts, the relevant question under Hill is whether the officers reasonably believed that Garrison's apartment was actually part of McWebb's premises. An officer's reasonable mistake of fact, made while securing or executing a warrant, is not "unreasonable"

conduct within the meaning of the Fourth Amendment.

B. The Exclusionary Rule Does Not Deter Reasonable Mistakes Of Fact.

In Michigan v. Tucker, 417 U.S. 433, 447 (1974), this Court explained:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular officers, or their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good

> faith, however, the deterrence rationale loses much of its force."

The deterrent effect of the exclusionary rule is weakest where the illegality sanctioned results from a reasonable police misapprehension of relevant facts. A decision suppressing evidence may instruct the police as to the law they should follow henceforth, but such a decision cannot alter their perception of facts in future cases. As recognized in People v. Gurley, 23 Cal.App.3d 536, 553, 100 Cal.Rptr. 407, 419 (1972), quoted in People v. Moore, 31 Cal.App.3d 919, 924, 107 Cal.Rptr. 590, 593 (1973):

> "No deterrence is involved if the officers have acted in good faith on the facts as they appeared, because presumably they will be entitled to, and

will, so act again in the future."

If, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," United States v. Calandra, 414 U.S. 338, 348 (1974), the exclusionary rule was misapplied below when the state court suppressed evidence without taking into account the reasonableness of the officers' good faith mistake of fact.

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CONCLUSION

The judgment of the Court of Appeals of Maryland should be reversed.

DATED: April 24, 1986

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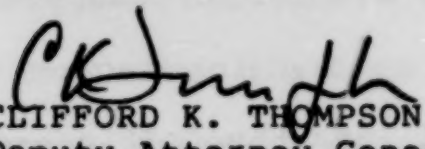

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CKT:ds

CERTIFICATE OF SERVICE BY MAIL

THE STATE OF MARYLAND, Petitioners,	)	
vs.	)	No. 85-759
HAROLD GARRISON, Respondent.	)	

CLIFFORD K. THOMPSON, JR., a member of the Bar of the Supreme Court of the United States, states:

That his business address is 6000 State Building in the City and County of San Francisco, State of California; that on April 24, 1986, he served true copies of the attached Brief for the People of the State of California as Amicus Curiae in the above-entitled matter on counsel for respondent and petitioners by

placing same in envelopes addressed as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

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